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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 658.

ROBERT B. BOLLING, PLAINTIFF IN ERROR,

VS.

GUSTAVUS LERSNER.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 9, 1875.

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1 In the supreme court of appeals at Richmond.

BOLLING
v.
LERSNER.

To the supreme court of appeals of Virginia:

The petition of Robert B. Bolling respectfully represents that in a suit in chancery, wherein Gustavus Lersner is plaintiff and your petitioner is defendant, a final decree was made by the circuit court of Fauquier County on the 23d day of December, 1873, requiring money to be paid and the possession and title of property to be changed, by which decree your petitioner is aggrieved, and he now presents this petition for an appeal therefrom.

To enable the court properly to decide on this petition, and enable it, if the petition be granted, properly to decide the questions that may arise before it, there is herewith presented a transcript of the record of the case, embracing a printed copy of the record upon the former appeal, (marked "No. 1,"*) which shows that your petitioner being possessed of valuable estates in Fauquier County, (see p. 166, dep. of R. C. McArtor, a witness for plaintiff,) embracing, besides Bollingbroke, containing 769 acres, a tract of land adjoining thereto known as Ben Lomond, containing 341¼ acres; there was signed the memorandum of the 19th of January, 1863, (pp. 20, 21, and 163–4,) according to which these estates and also the live-stock on the farms, farming utensils, and household and kitchen furniture, with certain exceptions, were sold for the sum of $77,000, payable as follows: $17,000 on the 1st of February, 1863, $30,000 on the 1st of March, 1863, and $30,000 on the 10th of March, 1863. The vendee "made default." What he did toward payment of the sums payable 1st of February, 1863, and the 1st of March, 1863, appears pp. 25 and 118; and, as may there be seen, payment was not punctually made at those times, but posterior thereto, and was not in gold or its equivalent, but in Confederate States treasury-notes, (pp. 25 and 118,) the comparatively small value whereof appears on p. 71 and in other places.

2 In respect to the sum of $30,000 payable on the 10th of March, 1863, there has been nothing deserving the name of payment—nothing which (as the vendor is advised) an English chancellor or a judge of this court could think of regarding as such. The contrivances which the vendee has ventured in a court of equity to call payment are set forth p. 26, et seq. He made to the vendor the communication of the 24th of June, 1865, (pp. 22, 23,) and sent the notice of the 15th of September, 1863, (pp. 23, 24,) without having either paid or tendered in lawful money the sum of $30,000, so payable on the 10th of March, 1863. After being in default for more than two years, and after it had been ascertained that his representations could not be relied on, he contents himself with talking about being ready at all times to meet the full extent of his obligations; and then, notwithstanding his default and untrue representations, and without waiting until there should elapse "one month after the termination of the war," (pp. 37, 77, 78, 120, 121, and p. 66 to 69,) he brought this suit on the 16th of Oc

* NOTE BY THE CLERK.—None of the counsel having desired the reprinting of the record upon the former appeal, the same has not been reprinted; but such copies of the record upon that former appeal as have been furnished to the clerk are appropriately annexed to copies of the residue of the record.

tober, 1865. To the bill (p. 14 to 20) the vendor filed his answer (p. 24 to 89) insisting that a court of equity should not decree specific performance, but should refuse its aid to complainant and leave him to seek his remedy at law, where a proper measure of damages may be awarded, and stating what he was advised that measure of damages would be limited to, (p. 39.)

On the 13th of September, 1867, the circuit court of Fauquier County made a final decree, whereby "the contract of sale between the complainant and defendant" was annulled and declared void.

Your petitioner is advised that this decree was by a court of competent jurisdiction, and is valid until it shall have been lawfully reversed. Although in the printed record, p. 11, there are these words: "Appeal awarded; bond with surety to be given in the penalty of $1,500, conditioned as the law directs. W. Willoughby, judge. May 17, 1869;" yet after the date of said final decree, and after the act of March 15th, 1867, (Sess. Acts, p. 789, c. 19,) there elapsed two years before the record was delivered to the clerk of the appellate court, and before process issued upon the appeal, and before such bond was given as was required to be given before the appeal could take effect, as may be seen by the transcripts marked "No. 2 A" and "No. 2 B;" and your petitioner is advised that the said decree of the 13th of September, 1867, has never been reversed by "due process of law."

That decree was by a judge appointed under "what was known as the Pierpont government, an organization which was recognized by the President and by Congress as the State of Virginia," and afterwards recognized as such by the Supreme Court of the United States. (Virginia v. West Virginia, 11 Wallace, 56.) The State was in the possession of the power to maintain a judicial department, and it is not pretended that any grant of it to the General Government is found in the Constitution of the United States. It is, therefore, one of the sovereign powers vested in the State, "and in respect to which the State is as independent of the General Gov-
3 ernment as that Government is independent of the States." (Collector v. Day, 11 Wallace, 126.) When, therefore, under color of certain acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, commonly called the reconstruction acts, and of an appointment by the general exercising military authority under the second section of the said act of the 19th of July, 1867, W. Willoughby took upon himself to act as judge in Virginia, such action was in violation of the Constitution of the United States, (which every judicial officer is bound by oath to support,) and has no more legal validity because of those acts of Congress or the action thereunder by the President of the United States, or by the general exercising military authority, than it would have had if there had never been such acts of Congress or such action by the President or the general. For "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances." (Ex parte Milligan, 4 Wallace, 120, cited in 6 Rob. Pract., tit. v, p. 622.) "Congress has no power to supersede the National Constitution." (White v. Hart, 13 Wallace, 649.) Hence the words "appeal awarded," with the name of W. Willoughby as the signature, were entitled, in law, to no more effect than if they had been written by one of the counsel in the cause, or by anybody else. The allowance of the appeal was null and void. It was not by "due process of law," but by undue process, and in violation not only of the constitution of the State, but of the first section of the first article of

the Constitution of the United States, and of the fourth section of the fourth article of said Constitution, and of the fifth and tenth articles of the amendments to said Constitution, and also of the fourteenth amendment thereto. The first order proper to be made in the case—before and instead of the order made on the 19th of April, 1872—was an order dismissing the appeal. Such dismission was proper, notwithstanding the act of assembly of Virginia, passed on the 4th of March, 1870, (Sess. acts 1869-'70, ch. 1861-'2.) For whatever might then have been the power of the legislature as to officers merely ministerial, and as to official acts theretofore done by such ministerial officers, the general assembly could not under the then or "present constitution and laws of this State," nor consistently with the fourth section of the fourth article of the Constitution of the United States, or the fifth article of amendments to said Constitution, or the fourteenth amendment thereto, recognize W. Willoughby as a judicial officer of this Commonwealth, nor make acts theretofore done by him as legal and binding as if they had been done by a judicial officer, duly elected and qualified, under the constitution of this State. The order of the 17th of May, 1869, (allowing the appeal,) which was then null and void, continued to be null and void notwithstanding the act of the 5th of March, 1870; the decree of the 13th of September, 1867, remains binding, notwithstanding
4 any subsequent act of the legislature. (7 Rob. Pract., tit. 1, §8, p. 26.) The appeal should have been dismissed according to the "constitution and laws of this State," as they were at the time of the passage of said act of the 4th of March, 1870, and before the enactment of the 28th of February, 1872, (Sess. Acts, pp. 98-'9.)

When this act was brought into the view of the judges of the supreme court of appeals, they no doubt encountered difficulties. The first thing proper to be considered was, whether it did not violate the constitution of the State; in dealing with which question the court was to "take care that it neither abandons a jurisdiction rightfully belonging to it, nor usurps that which does not. (Iredell, J., in Mansfield's Lessee v. Levy, 4 Dall., 337, cited in 7 Rob. Pract., tit. 1, §5, p. 14.) In the exercise of the jurisdiction rightfully belonging to it, it was not to give to sect. 3 of art. 5 of the constitution a meaning which "would involve a manifest absurdity." (1 Story on Const., § 400, p. 384.) The framers of the constitution would have been guilty of a great absurdity, if after declaring that the supreme court of appeals "shall consist of five judges," and after providing that the assent of a majority of these five judges "shall be required, in order to declare any law null and void by reason of its repugnance to the Federal Constitution, or to the constitution of this State," had then provided that a special court of appeals, consisting of not more than three judges, may be formed, "to try any cases on the docket of the supreme court of appeals which cannot be otherwise disposed of with convenient dispatch;" that two out of the three might decide any such cases; that if only two were sitting, and they were equally divided, there was to be an affirmance; and that a decision declaring "any law null and void by reason of its repugnance to the Federal Constitution, or to the constitution of this State," might be made by the judgment or decree of one judge sitting as a circuit judge (in the court below,) affirmed by one other circuit judge (sitting above in a special court of appeals.) But the framers of the constitution of 1868 were guilty of no such absurdity when they employed the same words which had been used in the constitution of 1852, under which, besides the supreme court of appeals, consisting of five judges, there was a district court of appeals, held by the judges of the circuits constituting the sec-

tion, and the judge of the supreme court of appeals for that section; so that there were five judges of every district court of appeals except one, for which there were six. That the framers of that instrument never meant a special court of appeals to be formed of not more than three judges, is manifest on its face. Their meaning in this respect was carried out by the act of Feb'y 25, 1854. (Sess. Acts, 1853-'4, p. 18, ch. 17, § 3.) With due regard for the past history of the State—for the reason and spirit of the constitutional provision or the causes which led to it—as well as to the words which are used, it may well be concluded that the framers of the constitution never meant to authorize, and have not authorized, cases on the docket of the supreme court of appeals, consisting of five judges, to be tried by a special court of appeals, formed of no judges of the supreme court, and of only three judges of the circuit courts. As the supreme court, though consitting of five judges, may be held by any three of them, so a special court of appeals, after being formed of the same number of five, may, when sitting, consist of not less than three nor more than five; but it can be no valid court until it shall have been first formed of five judges. Therefore, as your petitioner is advised, the judges of this court might, in April, 1872, properly have declared that the constitution and the act of February 28, 1872, "are in opposition, and cannot exist together;" and following the example of the judges in 1788, (4 Call, 146,) might properly have declined "to do anything officially in execution of" that act. Such an act is not "due process of law."

No matter of what number of judges the special court of appeals might be formed, your petitioner is advised that his case could not, "by due process of law," be placed upon the docket of said special court, or certified to it, unless previously thereto he had, as permitted by the act of March 31, 1848, (Sess. Acts, p. 51, ch. 68, § 4,) the opportunity of objecting thereto, and failed to make such objection; or unless previously thereto he had the opportunity of making his objections before the supreme court of appeals, and of being heard in support of such objections. (7 Rob. Pract., tit. 1, § 7, p. 22 et seq.) The court failed to act upon that great principle of justice, that in every judicial proceeding, "qui aliquid statuerit, parte inaudita alterâ, æquum licet statuerit, non æquus fuerit.' Your petitioner had retained counsel to appear before the supreme court of appeals; one of them (the draughtsman of this petition) residing in the District of Columbia, and ready to appear before this court immediately upon being informed there was occasion for it; the other (Mr. James Alfred Jones,) residing in the city of Richmond, and always in attendance upon this court when there seemed any reason for it. They had conferred together, and agreed that this case ought not to be certified to the special court; and that if there should be any step for the purpose, objections should be made thereto; and such objections would have been made if there had been any opportunity. The day before the term ended, when there were at least thirty-two cases before your petitioner's; when the court had ceased calling its docket for that term, and your petitioner's counsel had no reason to suppose that any step would be taken in his case during that term, there was made the order of the 19th of April, 1872, (marked No. 3.) Your petitioner is advised and insists that the step so taken in his case without any previous rule upon him to shew cause against it on any other previous notice to him or any of his counsel, was a step not taken "by due process of law. (7 Rob. Pract., ch. 1, § 17, p. 124 et seq.)

Even if this court could under the constitution be properly clothed with the power of designating the judges to constitute the special

6 court of appeals, or be properly clothed with the power of designating all the cases to be tried by the special court—both of which propositions your petitioner has controverted, and still controverts—he is advised that the power is for a special object; that whatever power is exercised under the first section of the act of Feb'y 28, 1872, must be limited to cases "which cannot be otherwise disposed of with convenient despatch." Such being the special statutory power, he is advised that the order of the 19th of April, 1872, which purports to certify his case without any affirmation by the court that it is a case "which cannot be otherwise disposed of with convenient despatch," without a statement of this in the order as matter of fact, is void; and that there has been no transfer of his case from the court by "due process of law." It is so, although the order may purport to be under colour of or in pursuance of the first section of the act. That mere reference to the source of the power is not enough. "However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it, the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the lord chancellor as to any order of petty sessions." Such was the language of Coleridge, J., on the Queen's Bench in 1840. (Christie v. Unwin, &c., 3 Per. & Dav. 208, cited in 7 Rob. Pract., tit. 1, § 6, p. 20.)

Thus it was that your petitioner's case came before judges who could exercise no lawful jurisdiction in it. Coming before them, as it did, under colour of the act of Feb. 28, 1872, the framers of which had disregarded the principles of the act of March 31, 1848, in Sess. Acts 1847-'8, p. 51, ch. 68, (which had been sustained as constitutional,) and had omitted safeguards provided therein, and also in the act of Feb. 25, 1854, (Sess. Acts, p. 18, ch. 17,) your petitioner's counsel were impressed with the great and serious difficulty arising from the designation by this court of the judges who were to try cases, and of the cases which they were to try. To make before such judges objections to the exercise of their jurisdiction, and offer arguments in support of such objections, however valid they might be, would have been useless, and worse than useless—useless, for the answer would have been that when the supreme court had certified a case to them it did not become them to consider such objections—and worse than useless because they were incompetent to decide a matter in which they had an interest; (7 Rob. Pract., ch. 1, § 1, p. 28 et seq.;) and they had a direct pecuniary interest to sustain their jurisdiction to decide this case and the other forty-nine cases certified by the order of the 19th of April, 1872, and every other case which might be certified to them under the act of Feb. 28, 1872, (see p. 69 of new record.)

It was not a case in which in that stage of it there could be a writ of error from the Supreme Court of the U. S. to the order of the 19th of April, 1872; and the act of Feb. 28, 1872, contained no provision for the retransfer of a case to the supreme court of appeals. With
7 such difficulty of going either forward or backwards, your petitioner could but act in like manner as was done in Wise v. Lamb, (9 Grat., 309,) and submit for the time being to the order of the 19th of April, 1872, without acquiescing in that order or giving any consent to the exercise of jurisdiction under it, even if such consent would have precluded an objection to such jurisdiction, which he is advised it would not. (7 Rob. Pract., ch. 1, § 2, p. 34, and ch. 1, § 17, p. 124 et seq.)

In the vacation of the supreme court of appeals, at an early period after the judges came together at Staunton, two or three months before

the commencement of the next term at Richmond, and about five months before a decree by the special court of appeals, your petitioner's counsel, in a communication of the 26th of August, 1872, (p. 70 to 75 of new record marked "No. 4,") informed the president of the supreme court of appeals that the order transferring his case from that court was objected to, and expressed an earnest desire for an argument before that court. In a further communication of the 9th of Sept'r, 1872, his views were enforced. Insisting that the ex-parte order of the 19th of April, 1872, might be treated like any other step in a case improvidently taken, like any other order improvidently made, he insisted (p. 80 of new record) that the supreme court of appeals might set aside that order, and urged that such course should be taken as would enable this case to be heard by the highest judicial tribunal of the State without any unreasonable delay. But the judges of the supreme court of appeals manifested a disinclination to have the case heard before them while the judges of the special court had it under advisement.

After two out of the three circuit judges sitting as a special court of appeals had made the decree of the 27th of January, 1873, (p. 1 of new record,) reversing the decree made by another circuit judge there was a petition for a rehearing, and one of your petitioner's counsel made a communication to the special court (p. 84 of new record) suggesting that the special court should not only set aside its decree and grant a rehearing, but afterwards, in due time, transfer the cause to the supreme court of appeals, it appearing that power to make such transfer had been given by the act of the 17th of January, 1873, (Sess. Acts 1872–3, p. 26, ch. 39.) But although the four circuit judges who had heard the cause were divided in opinion, the two who had made the decree would not exercise the power which it is clear they now had of granting a rehearing and transferring the cause to the supreme court of appeals.

In the circuit court of Fauquier County your petitioner insisted that the decree of the special court was null and void on the grounds stated and set forth in his written objections, (p. 2, 3, and 4 of new record.) But the said circuit court, nevertheless, on the 17th of April, 1873, ordered that the decree of the special court of appeals should be entered as its own decision; and thereupon made the decree, (p. 2 of new record. On the 17th of December, 1873, there was filed a petition
8 for a rehearing, and therewith sundry exhibits, but the rehearing was not granted, (p. 68 et seq. of new record.) On the 20th of December, 1873, the cause was again heard on the papers before read, the commissioner's report filed 28th of November, 1873, (pp. 5, 6,) depositions of witnesses and exhibits (p. 7 to 66) and exceptions to said report, (p. 66 to 68,) whereupon the court pronounced the opinion and made the decree (p. 85) recommitting the report with instructions. On the 23d of December, 1873, another report was filed, (p. 85 to 88,) to which there were exceptions; whereupon the court, overruling said exceptions and confirming said report, made the decree, (pp. 88, 89.)

Your petitioner now assigns the following errors:

1. Even though the decree made on the 27th of January, 1873, was not void; even though the circuit court had been authorized to make the decree, which it did make on the 17th of April, 1873, yet that court erred in overruling your petitioner's exceptions to the extent that it did on the 20th and 23d of December, 1873. Sir John Romilly did, indeed, suppose, in 1853, when specific performance was decreed that "an account of rents must be taken in the same manner as in the case of a mortgagee in possession, namely, of that which without the defendant's wilful default he might have received." (Sherwin v. Shakspeare, 17

Beavan, 277.) But there was an appeal, and his decision was not sustained. The Lord Justice Knight Bruce, in 1854, said: "I have never heard that rule laid down, nor do I believe that it is according to the practice of the court. There is an analogy between such a case and a mortgagee in possession, but a very imperfect analogy. There may also be an analogy between this case and that of a trustee, but that is also an imperfect analogy. In the case of a trustee, we know that a special case must be made before he can be so charged. In the case of a mortgagee it is a matter of course, and no special case is required. My impression from the course of the court (as far as I have been acquainted with it,) and upon principle, is that a special case ought to be made for the purpose of inserting those words in a decree for specific performance, where the vendor has been in possession during a time in which he is to account for the rents. Now here there is no such special case. There appears to be no evidence that the vendors have not in every respect properly managed and dealt with the property." (S. C., 5, De Gex, Macnaghten & Gordon, 531–'2.) The Lord Justice Turner concurred. He said: "There is a vast distinction between the position of a vendor and that of a mortgagee who enters into possession of the estate. The mortgagee, when he enters, enters under a condition imposed on him by this court of exercising the utmost diligence for the benefit of himself and the mortgagor; but in the case of a vendor, the vendor does not take, but remains in possession of the estate. It may ultimately appear that the estate of which he is in possession may never become the estate of the purchaser at all, and I think that if he continues in the due and ordinary management, it is not in the course of this court to charge him, upon the principle of his having been con-
9 verted into the position of a mortgagee for the purchase-money." (S. C., 536–'37.) This case was regarded by Sir John Romilly, in 1859, as settling that the mode in which the vendor is to account is to be "in the ordinary manner of a trustee, and not as a mortgagee in possession." (Regents' Canal Co. v. Ware, 23 Beavan, 588.)

Quite consistent with these authorities are other cases which show that where a person has been in what is called bona-fide perception of the profits and has made expenditure for the benefit of the estate, the rule of the civil law does not so totally differ from the rule of the English chancery as has sometimes been supposed. (Camegy v. Scott, 7 Bligh, N. S. 462.) The party required to account for rents and profits was allowed for lasting improvements in Savage v. Taylor, (Cas. Temp. Talb., 239.) In Kentucky in 1842, Robertson, C. J., used language which will be found quite apposite to what has been said by the plaintiff's witnesses and to what has been done by the commissioner. The chief justice said as to the appellant there: "Having occupied the land successively for many years, occasional repairs and improvements may be presumed to have been intermediately made by him; and this consideration seems not to have been regarded or noticed by the witnesses in their estimate of the profits, and who all appear, moreover, to have looked to the annual value for each single year rather than to the aggregate for a long term of years, subject to all incidental deterioration and expense. We should doubt, therefore, whether the estimate of the rents may not be rather higher than, under all the circumstances, it should be." He considered it proper to have "an inquiry and report as to ameliorations which may have been added by S. H., and to be deducted from the rents." (Haggin v. Haggin, 2 B. Monroe, 320.) In the same year Sir James Wigram, on the same principle, directed an account of what had been expended for necessary repairs and lasting im-

provements. (Neeson v. Clarkson, 2 Hare, 176, 24 Eng. Ch. R.) It was submitted to without argument, and the petition of rehearing raised a question only as to the time at which the account was to commence. The propriety of the account was not questioned. There, as here, when the party was receiving the rents or profits, and laying out money in repairs or improvements, he supposed himself seized in fee of the estate. He was thought entitled to this relief on the ground that he who would have equity must do equity. (S. C., 4 Hare, 99, 30 Eng. Ch. R.)

The present case comes plainly within the rule laid down by the lords justices. There is no such special case as is required to be shown by the other side. In the language of Sir J. L. Knight Bruce, there appears to be no evidence that the vendor has not, "in every respect, properly managed and dealt with the property." In the words of Sir George James Turner, "he continues in the due and ordinary course of management." In the language of others, what has been done is what would have been done with his own. (5 Rob. Pract., ch. 70, § 8, p. 1025.)

And this for the best reasons in the world—that according to the
10 decision of the circuit court, on the 13th of September, 1867, (and *to* which, if there has ever been any lawful supersedeas to it, he had no notice thereof till some time after the 11th of November, 1869, when the appeal bond seems to have been given,) he supposed it to be his own. The vendor's manager, clerk, and book-keeper was his son, Townshend Bolling, (p. 8.) He has deposed, (p. 39,) as to the condition of the premises at the close of the war, and the improvement since, and he has exhibited an account of the receipts from and disbursements upon the premises, (p. 43 to 50,) which is supported by his evidence and that of Bartlett Bolling, (p. 58 and 64;) but the plaintiff's counsel has excepted, upon the ground that the standard of accountability is not the amount actually realized, but that "which might have been realized under a fair and proper system of renting." There are like exceptions to questions asked other witnesses. Thus a question to Edward C. Turner, (p. 17,) is excepted to, on the ground that the measure of liability is "according to the annual value of the property in the hands of a judicious tenant, and not by the actual value of the land to the holder." According to the opinion of this witness, the property "had been managed by the owner, and an owner, too, who had been particularly careful of it. It certainly does not look like other farms that have been in the hands of tenants," (p. 17.) Nathan Loughborough, (p. 21,) speaks of the improvement in value under your petitioner's management since the war. He estimates (pp. 22, 23) that since then the land is increased in value ten dollars an acre, "because a great deal of the land which was then left bare, after cultivation in corn, was sowed in small grain and grass-seed, is now in grass, and that which was already in grass has been improved, because it has been grazed lightly—that is, the earth always covered with grass." The breadth of grass "has been greatly increased." Dr. A. S. Payne concurs in opinion as to the enhancement in value, (p. 27;) he thinks "Mr. Loughborough's estimate a very moderate one." He has "noticed that there is a good deal more and better grass than there was, and the fencing is better. A good deal of plank fencing has been put upon Ben Lomond, (p. 28.) Hugh Rogers, (p. 29,) also speaks of the condition of the farms as being very much improved as compared with what they were in 1866. He estimates the enhanced value per acre at not less than ten dollars per acre. Douglass Tyler (p. 36) is asked, "would not a landlord be better off who had received a thousand dollars rent per annum and get has land back in the condition that Mr. Bolling now has it, than to

have rented out for the past seven years to a tenant who was to pay $2,000 a year, and to be allowed to so manage the land as to be enabled to pay that sum?" His answer is, "I would rather have the thousand dollars, if I were the landlord, and the land back in its present condition." Thomas N. Latham concurs (p. 38) that "the management of the farm has been to improve the land." He thinks there is a difference of from "ten to twelve dollars per acre" in the intrinsic value of the land managed as Mr. Bolling has managed it, and what it would have been rented
11 so as to have enabled the tenant to have paid the rents," which witness had put upon it, so as to have made something out of the land." The improvement in the value of the land under the management thereof is also deposed to by F. Lewis Marshall, (pp. 50, 51,) Bowles E. Armistead, (p. 54,) and Bartlett Bolling, (p. 58;) and there is evidence of the same nature on the other side. (See John A. Carter, p. 13.) But all such evidence was disregarded by the commissioner. He did not think that "the actual profits" "should be the basis of the charge," (p. 6,) but charged for rent an estimated sum of $1,925 per annum, and on what was so estimated to be "rents and profits," allowed interest, notwithstanding Payne v. Graves, (5 Leigh, 561,) (Roper v. Wren,) 6 id. 38, and other decisions of this court on the same principle, and he failed to give your petitioner credit for the full amount to which he was entitled, in respect to the bills whereof Caldwell, Shannon & Co. had been holders. Hence the exceptions on pages 66, 67, and 68. As to these, your petitioner insists that the court erred (p. 85) in overruling the first, third, sixth, and seventh, and also in overruling, so far as was done, the fourth, fifth, and eighth. For the court held that there was no error in failing to give your petitioner credit for any increase in the intrinsic value of the lands, and though the judge was of opinion that the mode of treatment by the occupant should have some influence in determining the annual value with which your petitioner was to be charged, yet he erred in fixing that annual value at fifteen hundred dollars per annum for every year embraced in the commissioner's report. And though he was of opinion that your petitioner was entitled to one small item of $15.75, mentioned in the eighth exception, and for fencing, gates, repairs, and pump, yet he disallowed other items embraced in that exception, among which are payments for grass-seed and plaster. These errrors in the decree of the 27th of December, 1873, (p. 85,) exist also in that of the 23d of the same month, (pp. 88, 89.)

Secondly. Insisting on the objections mentioned in the new record, pages 2, 3, and 4, and on the arguments contained in the printed document mentioned on page 85 thereof, a copy of which is attached thereto, and especially insisting on the grounds in the petition for a rehearing, (p. 68 et seq. of the new record,) and on the arguments contained in this present petition, your petitioner now here insists that the action of the circuit court in ordering that the decree of the special court of appeals be entered as the decision of the circuit court, and directing one of its commissioners to take such account as was thereby directed, and the subsequent decrees of said circuit court, especially its final decree made on the 23d of Dec., 1873, are not only not according to the constitution of the State of Virginia, but are repugnant to the first and tenth sections of the first article, and the fourth section of the fourth article of the Constitution of the United States, and to the fifth and tenth articles of the amendments to said Constitution, and repugnant to the fourteenth amendment of said Constitution. For that which was appre-
12 hended on the 17th of April, 1873, when your petitioner's objections

were filed in said circuit court, and on the 17th of Dec'r, 1873, when his petition for a rehearing was presented, will unfortunately have become practically true, if the said decree of the 23d of Dec'r, 1873, shall remain in full force without being reviewed and reversed; he will have been deprived of his "property without due process of law," and so deprived by a decision against the title, right, privilege, or immunity specially set up and claimed by him under the Constitution of the United States.

Your petitioner is advised that this court may and should review and reverse the said decree of the circuit court so made on the 17th of April, 1873, and its subsequent decrees, including its final decree of the 23d of Dec., 1873, although the said circuit court may have considered that it was proceeding in conformity with the requirements of the decree of the special court of appeals. For your petitioner is advised and insists, that the decree of the special court of appeals is the decree of a court without jurisdiction, and so far from being conclusive is a nullity, (7 Rob. Pract. tit. 1, § 5, p. 14; § 6, p. 16,) and that its sitting as an appellate court, does in no way prevent its decree from being null and void. (Id. ch. 1, § 17, p. 124 et seq.)

Your petitioner is advised that this court may, and should, review and reverse the said decrees of the circuit court, although the special court of appeals may have considered that it was proceeding in pursuance of the order of this court made on the 19th of April, 1872. For he is advised and insists that that order was improvidently made, at least so far as regards this case; that as in Wise v. Lamb, (9 Grat., 310,) not only the improvident order but all subsequent proceedings were set aside, so there should be the like course here; that even when an appellate court, though it be the court of last resort, has made a final decree, it may at a subsequent term declare it null and void, and proceed accordingly. (Ex parte Crenshaw, 15 Peters, 119, cited in 7 Rob. Pract., ch. 1, § 18, p. 129 et seq.) That the case is plainer here where the appellate court, on the 19th of April, 1872, made no final decree, took but a single step, acted only on a single matter, and may now, upon an appeal from a final decree, have the whole case before it. (Ogle v. Lee, 2 Cranch, 33.)

Your petitioner is advised that an appellate court, having the whole cause before it upon an appeal from or writ of error to a final decree, may properly act upon the principle laid down by this court in 1810, that "jurisdiction must in all cases precede discretion;" that, as it then said, "the time and manner of proceeding in order to give the court cognizance of the cause" is "as essential as the nature or amount of the matter in controversy," and "that until the court has legal possession of any cause, although it be upon their docket, it has no power over it but to dismiss it," (Clarke v. Com., 1 Munf., 161–'2, cited in 7 Rob. Pract., ch. 1, § 2, p. 35, note,) so the court should now say that the only jurisdiction which it could properly have exercised over this case on the 19th of April, 1873, was to dismiss the appeal as not awarded according to law, and not of any force or effect, and that the exercise of this jurisdiction should have preceded the exercise of discretion as to certifying or transferring the case to the special court, even if it had such discretion. As in White v. Tommey, &c., (4 Ho. of L, 335–'6,) the House of Lords regarded the litigation as ended in 1847; so in this case, this court may regard it as ended by the decree of the 13th of Sept., 1867, and hold here as there, "that all that was done afterwards, as to bringing it again in question, was done in error and contrary to principle, as the House of Lords then (1853) discharged the order of the 23d of

13

May, 1848, allowing the appeal, and the order of the 2nd of July, 1850, made upon hearing the appeal, so this court may discharge the order of the 17th of May, 1869, allowing the appeal and the decree of the 27th of January, 1873, and let the case be dealt with accordingly. (See 7 Rob. Pract. ch. 1, § 18, p. 133 et seq.; White v. Tommey being mentioned at the end of that section.)

Should the appellate court be of opinion that the order of the 19th of April, 1872, must, as regards this case, be set aside or treated as void, and that all subsequent proceedings in this case are also void, and yet hold that the appeal from the decree of the circuit court, made on the 13th of September, 1867, not having been lawfully disposed of by the said order of the 19th of April, 1872, or by any subsequent proceeding, is still depending and not to be dismissed for want of jurisdiction, then it follows that the last-mentioned decree must be re-examined; and your petitioner is advised that such re-examination will authorize the conclusion that the specific execution sought by the bill should be denied and the bill dismissed in toto. For here there was misrepresentation of the vendee connected with the transaction of the 18th of April, 1863, relied on in the bill, and not only connected with the particular transaction, but the very ground which gave rise to that transaction and upon which it took place. And here the bill is not to set aside the contract, as in Small, &c., v. Attwood, &c., (Younge 407, S. C.,) Attwood v. Small, &c., (6 Cl. and Fin., 395,) or Wainer v. Daniels, &c., (1 Woodb. & Minot, 103,) but a bill for specific performance. In such a case, whatever may have been urged before the special court of appeals, it cannot avail the vendee for his counsel to argue before the supreme court of appeals that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing. For before and until the decree of that special court in this cause, courts of equity "have constantly held that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise, they will leave him to his remedy at law." (Harnett v. Yeilding, 2 Sch. and Lef., 554.) Where, according to the evidence, "the plaintiff has been guilty of a degree of misrepresentation, operating to a certain though to a small extent, that misrepresentation disqualifies him from calling for the aid of a court of equity; where he must come, as it is said, with clean hands, he must, to entitle him to relief, be liable to no imputation in the transaction." (Cadman v. Horner, 18 Ves., 11; Parker v. Carter, &c., 4 Munf., 288; Thompson v. Tod, Peters' C. C. R., 385; Wall v. Stubbs, 1 Madd. C. R.,
14 p. 80 of Eng., p. 54 of Am. edition; 2 Tuck. Com., 411.) Such is the rule; whether the misrepresentation was wilful or not, it is enough, although it arose "from misunderstanding." So Sir Thomas Plumer laid down in Clermont v. Tasburgh, (1 Jack. & Walk., 118.) In vain was it urged that the plaintiff would abide by the agreement, exonerated from what is affected by the misrepresentation. Sir Thomas Plumer said: "There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame; misrepresentation, even as to a small part only, prevents him from applying here for relief." (S. C., 118.) He said: "If it were otherwise, and if a contract under these circumstances were only

to be altered pro tanto, and only the part thus obtained were to be taken out of it, what encouragement could be offered to fraud? The party, if not found out, would gain his object; and if detected would have the benefit of the contract in the same manner as if he had practised no deception. The court has, therefore, settled that he must come with perfect propriety of conduct. If he does not, that alone is a sufficient answer to him." (S. C., 121.) He must take care that his own conduct has been exactly correct. (Garnett v. Macon, &c., 6 Call, 370; 2 Brook, 246.) Even in such a case as Harris v. Kimble, (1 Sim., 111; 2 Cond. Eng. Ch. R.,) the decree made by Sir John Leach for specific performance was reversed and the bill dismissed. It was in vain argued before Ld. Lyndhurst, "as to the purchase-money for the lease of the box, that there was security existing upon the property and that compensation might be given." He said: "This is not sufficient. Fraud and misrepresentation operate as a personal bar to the relief." (S. C., 5, Bligh, N. S.; 751.) His decision was affirmed by the House of Lords, his successor (Ld. Brougham) and Ld. Plunkett concurring in such affirmance. (S. C., 753-'4.) The court would not assist the plaintiff in Stanley v. Robinson, (1 Russ & Mylne, 527; 4 Cond. Eng. Ch. R.;) and this case was recognized in Virginia in 1839 in Gibbons v. Jackson, (10 Leigh, 876, cited in 2 Lomax's Digest, § 27, p. 56.) With these principles in remembrance, let there be an examination of the plaintiff's conduct in connection with the arrangement of the 18th of April, 1863, pp. 21, 22 of old record, on which the plaintiff's claim to relief essentially rests. Referring to the agreement of the 18th of January, 1863, p. 20, and briefly to what appears in the record as to the plaintiff's condition before the date of that agreement, (John Rea, p. 115; Gilbert N. Roy, p. 105; H. Dorsey, p. 106; Larkin Lake, p. 106; Robert M. Marshall, p. 107; Granville S. P. Triplett, p. 154; Benoni Wheat, p. 156; Thomas R. Foster, p. 157; Samuel T. Ashby, p. 161; William C. Norris, pp. 150, 151, 152,) and especially after
15 "his connection with the confederate quartermaster's department," (Norris, pp. 151, 152, 154; Triplett, 154, 155; Ashby, 161,) it is plain beyond all doubt that as to the sum of $30,000, stipulated to be paid "on the tenth day of March, 1863," the vendee was in default, (p. 25,) and formed the plan of getting the vendor to endorse negotiable paper for discount and of making to the vendor a quasi payment out of funds that might be obtained through such endorsement and discount. (See answer, p. 25, and John M. Bolling's deposition, p. 119.) Deponent states the following as part of the res gesta: "In shewing me this letter," (of Lersner proposing to his father to endorse Lersner's note on bank for $30,000,) "my father remarked that it was the most impudent proposition he ever heard of; that he would not entertain it for a moment; that he would go over to Richmond, and if Lersner did not pay the money, he would have nothing more to do with him, and would annul the contract." R. A. Lancaster makes this statement, (pp. 79, 80,) as to his conversation with the vendor: "He informed me that Mr. Lersner had made a proposition to him which he considered very ridiculous, to endorse sterling bills or notes, which were to be sold for the purpose of settling for his own land; he left a message with me for Mr. Lersner to the effect that if he did not comply with his engagement in a short time he would consider Mr. Lersner as wishing to cancel his contract for the farm." And yet the vendor was very quickly, perhaps the next day after this conversation, induced to make such endorsement on three bills of exchange, dated April 18, 1863, for £300, £400, and £500, making together £1,200, each of which was drawn on and directed

to Rob't Roe & Co., provision dealers, Liverpool. It is clear that the endorsement by the vendor was at the request of the vendee, (p. 21,) and was induced by his misrepresentations, (pp. 25, 26, 88.) Although the vendee had no reasonable ground to expect that any of these bills would be punctually paid, yet the vendor was induced to act as he did in the expectation that the vendee had a right to draw the bills as he did, and that they would be punctually paid in England at the expiration of the time they had to run, (p. 26.) In this expectation the vendor was disappointed.

According to John Rea, a copartnership was formed about the first of January, 1863, between himself, Gustavus Lersner, Emil Lersner, and Ignatius Lersner, under the firm of John Rea & Co., of New York, on certain terms stated, (p. 109.) He states that Robert Rea & Co., of London, were the consignees of the firm, and it never made any shipments to any other person or persons than Robert Rea & Co., of London; that Robert Rea arrived in New York about the 14th of April, 1863, accompanied by Emil Lersner, (who had left New York in March,) and stayed in this country about twenty days; and that while he (Robert Rea) was in this country witness saw a letter written by Gustavus Lersner, about the 29th of April, 1863, informing us (John Rea & Co.) that he had drawn three drafts on Robert Rea & Co., of Liverpool, for £300,
16 £400, and £500. The witness says: "Emil Lersner, Ignatius Lersner, and myself were present at the reading of the letter. The letter had been received while I was in Canada, and on my return Emil handed me said letter and asked me what I thought of it. I told him I did not know what to make of it. He answered and said, 'I think he has made a fool of himself, to draw on a house of which he does not know the name or location;' and they were surprised at his doing so. I asked them if they had given Gustavus any authority to draw on Robert Rea & Co., of London, and they said certainly not; that they had not given him any permission to draw on Robert Rea & Co., and that they had not even informed Robert Rea & Co. that he was a member of John Rea & Co." The witness says, (p. 115:) "There was an arrangement with Robert Rea, when he was here, in reference to the manner in which bills should be drawn on Robert Rea & Co.," and he states it. Robert Rea left New York for Europe the 6th May, 1863, and about the 23d of that month the firm in New York failed in business.

In an affidavit of Ignatius Lersner (which he deposes is true) it is stated that in January or February, 1863, he drew out of the firm of John Rea & Co. about $13,000, and paid it to Gustavus Lersner, except $95, (pp. 95, 96.) In his deposition excepted to, (pp. 104, 105,) it is pretended, (p. 90,) to have been agreed, when Gustavus was in New York, in January, "that the shipments which John Rea & Co. were then making to Robert Rea & Co., to the amount of about $10,000, should be on Gustavus' account, which he was to draw for at any time." But when, on cross-examination, he is asked, "Was there, during your connection with John Rea & Co., any produce or other goods shipped by them to Robert Rea & Co., at any time, or any funds placed in their hands for the account of Gustavus Lersner?" his answer is, "No, sir," (p. 92.) Whether or no any credit be given to the statement which Ignatius makes of a pretended agreement with Gustavus, it is very certain that Gustavus was not authorized to draw any such bills as those which he did draw on Robert Roe & Co., provision dealers, Liverpool; and equally certain that his representation by and at the time of drawing the same, was a representation that he had such authority, and was intended to induce the vendor to act as he did: and that the vendor would not have

so acted but for the vendee's false representation. (Polhill v. Walter, 3 Barn. & Adol., 123, 23 Eng. C. L.)

Moreover, inasmuch as Gustavus came to New York to see how John Rea & Co. were getting on in business, and asked all three of the partners there "about the affairs," (p. 101;) as Ignatius speaks not only of Gustavus being in New York in January and February, 1863, (pp. 90, 94, and 95,) but of his visits between the first of Jan'y, 1863, and the 6th of May, 1863, (p. 101,) on which last-mentioned day Ignatius claims to have retired from the firm, and obtained for his share and interest therein, including that of Gustavus, a note of $41,660.46, (pp. 60, 61;) Gustavus must have known then, if not before, that there had not been, and
17 would not be, on his account, any goods shipped to any firm in England—neither to Robert Roe & Co., Liverpool, nor to Robert Rae & Co., London—nor any funds placed in the hands of any such firm.

Furthermore, soon after, if not at the time, that note was made, Ignatius and Gustavus fraudulently combined and confederated to obtain for Gustavus the amount thereof, or as much of it as practicable, out of goods that might thereafter be purchased by John Rea & Co., and at the expense of persons from whom the same might be purchased. It appears that after that 6th of May, 1863, and just before the failure of John Rea & Co., which was about the 23d of that month, they purchased about $40,000 worth of bacon, and shipped the same to Robert Rea & Co.; and they, John Rea & Co., although indebted to Robert Rea & Co., (p. 116,) drew bills of exchange on Robert Rea & Co., and attached them to the bills of lading, and disposed of them to M. Mayer, from whom about $30,000 was received by Emil Lersner, (p. 116,) who placed in the hands of his brother Ignatius the checks received from Mayer and other funds mentioned in Emil's affidavit, (p. 48 to 50,) John Rea's, (p. 62,) and in the deposition of Ignatius, (pp. 94, 95.) Notwithstanding what is said in the affidavit of Ignatius, (p. 35,) the interest of creditors was disregarded. Owen T. Holmes, who frequently during the war went North for the vendee, (p .202,) and frequently since its close has been examined for him, (p. 83 to 85, p. 190 to 193, p. 193 to 206,) was in New York "about the 26th or 27th of May," to see after the interest of Gustavus. On that occasion he was in New York about five days, and saw Ignatius. They started together for the South, (p. 200,) and after reaching Lovettsville, Loudoun County, Va., when Ignatius had been therein about thirty minutes, and was only about ten miles from his brother Gustavus, he, Ignatius, was, at the instance of the New York creditors, and by order of General Schenck, then commanding that department, arrested the 3d of June, 1863, carried to Baltimore, examined there before the provost marshal, and then was taken or went to New York, (p. 100,) where he was put in jail. John Rae, who saw him there in Ludlow-street jail, about the early part of June, says, (p. 113:) "He then had the money he had received from Emil Lersner, and he told me that if I would keep still he would make a settlement with the creditors, and make a much better arrangement with them than I could. Ignatius told me he had the said money; I was confined in said jail at that time, at the suits of some of the creditors." In this conversation Ignatius spoke truly as to his having the money, but not as to what he would do with it. It appears that at the time of the arrest in Lovet'sville, Holmes sent to Gustavus "word that his house had failed," (p. 204,) and Gustavus went South. Shortly after that time, probably a month after, he went to New York by way of Nassau, (p. 204.) Then John Rea gives this account of him: "I saw Gustavus Lersner leaving the jail in July, 1863;

I asked Ignatius what Gustavus was doing there. Gustavus was not present at the interview. Ignatius replied that he came there to
18 get the proceeds of the failure. I mean the proceeds of the shipment of said bacon. I asked Ignatius what he was going to do about it; he replied that he was going to give the said money to Gustavus, and that he would have given it to him then, if he had had the money with him, but it was at his brother Morris' house, and he had to send up there for it. I asked him if he had not promised me that he was going to use that money towards the payment of the creditors of John Rea & Co.; he replied that he had so promised, but that it had been a settled thing between them and his brothers previous to the time of his getting the note of the 6th of May, 1863, that he was to get hold of that money on the first opportunity, and that if the creditors had been fifteen minutes later with the provost marshal in arresting him at the Point of Rocks, the money would have been paid in Gustavus' hands a month previous, for that at the time he was arrested he was in sight of Gustavus; and he said that I was very foolish to suppose that he was going to pay anything over to the creditors." It does not appear that this fraud was committed to enable Gustavus to pay the bills which he had without authority drawn on Robert Roe & Co., Liverpool, though a small portion of the amount so obtained would have sufficed to pay those bills if he had desired to make such payment, and thus make amends as far as he could for his misconduct to the endorsers, holders, and payees of those bills. It is very certain that he did not make any remittance to England for the purpose, although he was conveniently fixed for making it from New York, where he was, and although such remittance would have been in full time, his way of communication with England from New York being so much more rapid than that by which the bills could be sent from Virginia, where, in the language of the bill, (p. 14,) "communication with England was in that year much obstructed, almost cut off." After his fraud on the creditors, notwithstanding endeavors to arrest him, Gustavus "got off on a steamer to Nassau," (p. 114.) For the benefit of his brother Emil, who, after having absconded and remaining concealed for about twelve months, (p. 113,) was now again in New York and incarcerated, Ignatius makes statements, (p. 55,) which cannot well be reconciled with those made at another time, to promote the interests of his brother Gustavus. Nor is it material that they should be; it being very plain that none of the money or effects delivered by Emil to Ignatius, and by Ignatius to Gustavus, was transmitted to England to pay the bills drawn by Gustavus. Nor did he, or any one in his behalf, transmit any other money or effects for that purpose, or take such measures as it was his duty to take for their punctual payment. On the contrary, as to each of the bills, there was default, (p. 40 to 46, and p. 139 et seq.,) after the vendor's endorsement on the bills, each of which had thereon these words: "In case of non-payment, to be honored by Messrs. Crow, Wylie & Co., 3 India Building, Liverpool, Gustavus Lersner." Two of them, to wit, one for £300, the other for £400, were endorsed specially by Caldwell & Shannon, to Vignier, Robertson &
19 Co. of Havana, and by them to Brown, Shipley & Co. In the protests thereof, on the 10th of August, 1863, the notary states that he caused due and careful enquiries to be made in all usual and proper quarter for the drawees, but was unable to discover them, or to learn any tidings of them; that he afterwards attended at the office of Mr. John Roe, provision dealer in Temple court, Liverpool, who stated that the bill was not intended for him, and he did not know any firm of the name, and did not believe there was any such firm in the town. Both

were accepted August 14th, 1863, supra protest, for the honor of Vignier, Robertson & Co., the endorsers, by Charles Robertson, of Liverpool, who, in a letter of the 15th of that month to them, says, "It was ascertained that there was a firm by the name of Robert Rea & Co., (not Roe), in London, and the bills for £700 were sent there for presentation; but, as you will see by the enclosed memorandum, the firm of Robert Rea & Co., 33 Upper Thames street, returns for answer that they don't know the drawer, and never had any transactions with him. Messrs. Crow, Willie & Co. believe the drawer to be a respectable man, but he had no authority from them to refer the holders of any bills to them in the case of non-payment." The last bill, that for £500, endorsed to Fraser, Trenholm & Co., was protested for non-acceptance on the 3d of July, 1863, and for non-payment on the 2d of September, 1863, (p. 143, et seq.)

No man can truthfully affirm that this vendee who asks for specific performance comes into equity with "perfect propriety of conduct," "with clean hands," and is "liable to no imputation in the transaction." It is very plain that the contract of the 18th of April, 1863, is not "clear of the imputation of any deception" on his part, and equally plain that in his subseqent course with respect to the subject of that contract, there has not been on his part "perfect prop'iety of conduct." Upon the facts shown by the record he had no valid defence against the holders of the bills; (2 Rob. Pract. ch. 22, § 1, p. 184 to 186.) With these facts he was acquainted when he asked advice of his counsel as to his liability upon the bills, (p. 86 of old record,) and as to these facts he was guilty of improper representation or concealment in his communications to his counsel. For that counsel, if made acquainted with the true state of facts, could not be justified in advising a defence against bona fide holders, and in inducing the vendor to act as that counsel states he did, (p. 87, pp. 39, 40, p. 138, and p. 122.) It is thus ascertained that the vendee has been guilty of a degree of misrepresentation operating to a certain extent; guilty of such misrepresentation at the time of the contract of the 18th of April, 1863, and also at the time of the communications (in Dec., '63, or Jan., '64) between him and his counsel and between that counsel and the vendor. The misrepresentation on each of these occasions is such as disqualifies him from calling for the aid of a court of equity; "prevents him from applying here for relief." "That alone is a sufficient answer to him." Nor can he claim that his contract is only to be altered pro tanto; that only a certain part is "to be taken out of it." His misrepresentation operates as "a personal bar to the relief;" "operates as a bar to any relief whatever on his bill for specific execution." (Higgins v. Samels, 2 Johnson & Henning, 460.)

Again, independently of this "as a personal bar," there was no waiver of the vendor's lien by taking bills of exchange or by endorsing bills and receiving money from the proceeds thereof. (Grant v. Mills, 2 Ves. & Beame, 308; Saunders v. Leslie, 2 Ball and B., 514; Peake's case, 1 Madd. C. R., p. 355 of Eng., p. 196 of Am. edi.) For equity looksnot to form but to substance. (Tucker P. in Watts &c. v. Kinney & wife, 3 Leigh, 295.) There was no agreement for the extinguishment of the lien; (Winter v. Anson, 3 Russ. 488; 3 Cond. Eng. Ch. R.; Clark v. Hunt, 3 J. J. Mar. 558;) no agreement that the estate should be absolutely discharged whether the bills were honored or dishonored, productive or waste paper, (Teed v. Carruthers, 2 You. & Col., 39, 21 Eng. Ch. R.;) but the contrary. Even when money is passed as a payment, a party is at liberty to show that what appeared at the time to be a

good and satisfactory payment was perfectly illusory, and that what he received was not really any satisfaction for his claim. (Pritchard v. Hitchcock, 6 Man. & Gr., 166, 46 Eng. C. L.) Here the arrangement of the 18th of April, 1863, did not change the character of the debt; it still consisted of the purchase-money due for the land; (Knisely v. Williams, &c., 3 Grat. 265; Yancey v. Mauck, &c., 15 id., 310, 311; Day v. Hale, &c., 22 id., 163; De Cordova v. Hood, 17 Wallace.) That purchase-money continued unpaid while the three bills of exchange were unpaid. They have not been "fully paid," and the vendor "released from all liability as endorser," according to the true intent and meaning of the paper, (p. 21,) signed by the vendee, and consequently the conditions mentioned in the contract of Jan. 19, 1863, have not been "complied with and performed," as required by the terms of the paper, (p. 22,) signed by the vendor on the same 18th of April, 1863. According to the opinion of this court, if the money had been offered on the day last mentioned, the vendor might have refused to receive the money because it was not punctually paid; and a court of equity would not have compelled him in that case to convey the land. (Hale v. Wilkinson, 21 Grat., 89.) Then the privilege being conferred on him of paying it at the time the bills became payable, it is incumbent on him to show that which he cannot show, that the money was paid accordingly. (Davis v. Thomas, 1 Russ. & Mylne, 506; 4 Cond. Eng. Ch. R.) So far as the time of payment mentioned in the agreement of the 19th of Jan'y, 1863, was waived or extended on the 18th of April, 1863, that waiver or extension was upon the condition of payment at the extended time, to wit, when the bills became payable. Such payment not having been then made, there was no longer any obligation to make conveyance to the vendee. (Doloret v. Rothschild, 1 Sim. & Sta., 590, 1 Cond. Eng. Ch. R., 306; Goodwyn vs. Lyon, 4 Porter, (Alabama) 311; Wisival vs. McGown, 1 Barbour 278; Rogers v. Saunders, 21 16 Maine, 4 Shipley, 100; Merritt v. Brown, 19 N. J., 4 C. E. Green, 292.) On the faith of the vendee's representations and his engagement as drawer of the bills, the vendor having endorsed them and entered into the arrangement of the 18th of April, 1863, and the vendee having failed to do that which he has undertaken to do, a court of equity will leave the vendee to obtain such redress as he may be entitled to at law. (Myers v. Watson, 1 Sim., N. S., 529; 40 Eng. Ch. R.) For, as Ld. Cranworth well observes, where, acting on representations, "parties have entered into contracts, it would not be consistent with the doctrines of equity to compel them to perform those contracts at the instance of those who have failed in fulfilling the engagements which they entered into, and on the faith of which the contracts were made." (S. C., 531; 2 Story's Equity, § 193.) Nor is the vendee's case helped in the least by the representations of the vendee or the advice of his counsel in December, 1863, or January, 1864, or by what the vendor did upon such representations or advice, (pp. 86, 87.) For certainly the information then given the vendor (pp. 27–32) was very different from what the vendor acquired in May and June, 1865, when he came to the conclusion (pp. 30, 31) that the vendee had as to him been guilty of deception and misrepresentation, and as to the holder of the bills had received the design of fraudulently evading their payment. Notwithstanding the misrepresentations then, as well as in April, 1863, your petitioner was advised that he stood "as the unpaid vendor retaining the legal title," (Yancey v. Mauck, &c., 15 Grat., 310;) and he has acted accordingly, (pp. 31–32, 138.) There is nothing in his acts or conduct, since he acquired information as to the true state of facts,

that amounts to acquiescence in the vendee's conduct. The case comes within the acknowledged rule laid down by Chancellor Kent in Benedict v. Lynch, (1 Johns. Ch. R., 375,) and since (Bowles v. Woodson, 6 Grat., 88,) recognized by this court in Boolen v. Schoeffer, (21 Grat., 491;) and in accordance with which decisions have been made in several States, to wit, in Ohio, in 1866, in Rummington v. Israel, (7 Ham., 101,) and 1853 in Kirby v. Harrison, (2 Ohio St. R., 331;) in Alabama, in 1837, in Goodwyn v. Lyon, (4 Porter, 310;) in New York, in 1851, in Dominic v. McMichael, (4 Sandf., 426;) and in 1867 in Chase v. Hogan, (3 Abb., Pr. R., 67.)

It has long been established that "where one party to an agreeement trifles or shows a backwardness in performing his part of it, equity will not decree specific performance in his favor, especially if the circumstances and situation of the other party are materially altered in the meantime," (Hayes v. Caryll and others, 1 Brown's Par. Cas., p. 126 of Tomlin's edition.) In the case of Gibson v. Paterson, &c., (1 Atk., 12,) mentioned in Lloyd v. Catlett, (4 Brown's C. R. 471, note 3,) there is ascribed to Ld. Hardwicke language which Sir Richard Pepper Arden (afterwards Ld. Alvanley) thought it impossible Ld. Hardwicke should have used. (Fordyce v. Ford, id. 497.) After Spurrier v. Han-
22 cock, (4 Ves., 674,) to wit, in 1799, Ld. Loughborough spoke of Gibson v. Patterson as "a totally false report." At the same time the rule of Hayes v. Caryel was recognized and acted upon. (Harrington v. Wheeler, 4 Ves., 690.) It was now settled "that a party cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager." (Milward v. Earl Thanet, cited in 5 Ves., 720, note 2; Omerod v. Hardman, id., 734–737; Guest v. Homfray, id., 823; Alley v. Deschamps, 13 id., 229.) Here time was of the essence of the contract. (Doloret v. Rothschild, 1 Sim. & Stu., 590; 1 Cond. Eng. Ch. R.; Corlake v. Till, 1 Russ., 376; Sugden on Vendors, p. 382 of 8th, p. 444 of 9th, p. 268 of 14th London edition; Hopewell v. Knight, 1 You. & Col., (Excheq.,) 416–'17.) The language of Livingston, J., in Hipburn v. Auld, (5 Cranch, 279,) has since (Brashier v. Gratz, 6 Wheat, 533; Doar v. Gibbes, 1 Bailey's Eq., 373; Lewis v. Woods, &c., 4 How. Missis., 86; and Richmond v. Gray, 3 Allen, 29) been cited in Massachusetts with approbation by Chapman, J. In 1865 he said: "The evidence tends to show that the property was subject to frequent fluctuations in value on account of the frequent and almost daily fluctuations in the gold market, and that there was an actual change in its value; and we cannot doubt that time was not only an essential part of the contract, in fact, but that it was so regarded by the parties when they made their contract." (Goldsmith v. Guild, 10 Allen, 241.) Like views are taken in New Jersey, (Merritt v. Brown, 19 N. J., 4 C. E. Green, 293; Grigg v. Landes, id., 293; and Virginia, (Hale v. Wilkinson, 21 Grat., 89.) Default was made. The vendor complained and contemplated abandoning the contract, (p. 119, also 79–80,) as he had a right to do. (Heaphy v. Hill, 2 Sim., & Stu., 291; 1 Cond. Eng. Ch. R.; Watson v. Reid, Russ. & Mylne, 236, 4 Cond. Eng. Ch. R.; Walker v. Jeffreys, 4 Hare 346, 23 Eng. Ch. R.; Southcomb v. Bishop of Exeter, 6 Hare, 227, 31 Eng. Ch. R.; McBryde v. Weeks, 22 Beav., 533; Whyte v. Bennett, 7 Richardson's Eq., 278.) This was prevented by the vendee's untrue representations. By these representations he induced the vendor to endorse the bills and make the arrangement of the 18th of April, 1863. The vendee's default is not lessened by these representations or by what has been done in consequence thereof, but is greatly aggravated thereby, (pp. 28–29.) A court

of equity must say that the vendee shall be on no better footing than if these representations had not been made, (p. 27.) The vendor had a right to insist on performance on or before the 18th of April, 1863. He never did any act to forfeit this right except by extending the day, for the convenience and at the request of the vendee, to the maturity of the bills; and default having been made, the vendor was in the same position as if he had never allowed any extension, and had refused to go on with the contract after the 18th of April, 1863. (Parkin v. Thorold, 2 Sim., N. S., 9, 11 Beav., 59, 42 Eng. Ch. R.; Nott v. Ricard, 22 Beav., 311.) So it is likewise in respect to the untrue representations in December, 1863, or January, 1864. The rights of the vendor cannot
23 be impaired by anything that he was induced to do or omit doing under the influence of these representations. His first complaint of delay having been followed by that which was on the vendee's part ineffectual, and worse than ineffectual, there was a right on the vendor's part to abandon the contract, as has been done. (Tilley v. Thomas, L. R., 3 Ch. App. Cas., 72; Christian v. Cabel, &c., 22 Grat., 99.)

To authorize a decree for specific performance it must appear not only that the contract was, in all respects, fair and honest in the beginning, but that its performance may be fairly and conscientiously required. (Phillips v. Duke of Bucks, 1 Vern., 224; Whorwood v. Simpson, 2 id., 186; Marquis of Normandy v. Duke of Devonshire, Frem. Ch. R., 217; Marquis of Normandy v. Lord Berkeley, cited in 5 Ves. Abr., 539, tit. Contract and Agreement, [M] pl., 21; Stanhope v. Topp, 1 Brown's P. C., 157, Tomlin's edition; Thompson v. Harcourt, id., 193; Young v. Clark, Prec. in Ch. 539; Hick v. Phillips, id., 575.) On the principle of these cases, the decree in Gilb. Rep., 155, 156, was, after Lewis v. Lechmere, (10 Mod., 504,) reversed by the House of Lords in 1722, and the bill dismissed. (Kien v. Stukely, 1 Brown's P. C., 101, Tomlin's edition.) So, likewise, after Squire v. Baker, (5 Vin. Abr., 549 pl. 12,) the bill was dismissed in 1724 in Edwards v. Heather. (Select C. C., p. 3 of edition 1760.)

A court of equity has often refused performance of an agreement which it would not set aside. (Savage v. Taylor, Cas. Temp. Talb., 236; Twining v. Morrice, 2 Brown's C. R., 330, cited in 6 Ves., 338, and id., 308.) In the case of a hard bargain, where it is not absolutely executed but executory, the constant rule of the court is not to carry it into execution. (Barnardiston v. Lingood, 2 Atk. 139.) Because of the inadequacy of the consideration Ld. Hardwicke refused specific execution and dismissed the bill in 1749, in Underwood v. Hitchcox, (1 Ves., 279.) After Faire v. Brown, (cited in 2 Ves., 307, and 2 Ball & B., 297,) the bill was dismissed in 1759 in Redshaw v. Gov. & Co., of Bedford level, (1 Eden, 346,) and in 1774 in Pope v. Roots, &c., (1 Brown's P. C. 370, Tomlinson's edition.)

After the Revolutionary War, courts of equity in Maryland where Continental money had been stipulated to be paid, would not give aid towards enforcing the specific performance of such speculating engagements, but left the parties to the proper constitutional remedy for estimating damages. (Perkins v. Wright, 3 Har. & M., 326.) Notwithstanding the act of Oct. sess. 1780, ch. 5, as to contracts for the purchase of property in bills of credit between Sept. 1, 1776, and April 20, 1779, it was held that no case of a contract for the purchase of property with bills of credit made between these periods was entitled to the aid of a court of equity. (Lawrence vs. Dorsey, 4 Har. & M., 208–'9.)

In Virginia, in 1795, though it seems the vendee had been put in possession, "and probably made improvements on the land," yet he was

required to make just compensation, and to that end "the specie-value of the land" was to be ascertained. (White v. Atkinson, 2 Wash.,
24 105, cited in Lopman v. Crouch, &c., 19 Grat., 352.) Fleming, J., said, "Since, therefore, the appellant made the first breach in the contract, which operates to the injury of the other party, he is not entitled to the relief he asks, but upon the terms of his doing equity; and this consists in his paying the real value of the land at the time of the contract." (2 Wash., 101.) Here the sum of $77,000 mentioned in the memorandum of Jan. 19, 1863, (pp. 20, 21, and 163 of O. R.,) was about the value in specie. For the land-book of the commissioner of Fauquier for 1860, shows that the tract of 769 acres was valued at $65 per acre, without the improvements, which were valued at $12, making together for that tract with the improvements, $49,985, and shows that the other tract was valued at $40 per acre, without the improvements, which were estimated at $500, (pp. 74–'5.) This other tract, embracing 341¼ acres, (p. 75,) it follows that, if therefor, there be added $40 an acre, to wit, $13,650, the aggregate will be $64,135 exclusive of the stock, "worth about $3,555," according to Ashby, (pp. 161, 2,) and the household and kitchen furniture between $2,500 and $3,000, (Addison B. Carter, p. 173; N. Loughborough, p. 176,) and exclusive of "the farming utensils." Moreover, between the assessment and the date of the agreement "costly and valuable improvements were put upon the land." The two estates, which adjoin, and on which there is an elegant mansion, with all the appurtenances of a well-appointed establishment and farm, make certainly one of the best in Virginia. With the stock, farming utensils, and furniture embraced in the agreement they cost the vendee $77,000 in a currency equal to gold and silver, and were estimated by him to be worth that sum, (p. 25.) This estimate is supported by further evidence: (N. Loughborough, 158; James T. Jones, p. 159; Samuel T. Ashby, p. 161; Richard Welby Carter, p. 172; Richard H. Dulany, p. 172; R. H. Carter, p. 173; Joseph H. Blackwell, p. 174; Addison B. Carter, p. 173.) The property sold was worth far more than $77,000 in Confederate States treasury notes, even if the same had been paid at the times stipulated in the agreement. (Luther R. Spilman, p. 76; R. H. Carter, p. 173.) But the payments made were only on account of the two first instalments, and the value of what was paid on account thereof did not at the times those payments were made exceed $14,000, (p. 39 and 71.)

In the present case where possession has remained with the vendor and the improvements on the land have been made by him, and the other circumstances of the case are as hereinbefore stated, your petitioner is advised, that it is unconscientious in the vendee to insist upon, and unjust in the court to decree performance. (Carberry & wife v. Tannahill, 1 Har. & J., 224; Clowes v. Higginson, 1 Ves. & Beame, 527; Pratt, &c., v. Carroll, 8 Cranch, 476; 1 Madd. Ch. Pract., 405; 2 Tuck. Com., 464; 2 Rob. Va. Pract., 169, 170.) Referring to the position of Sir Edward Sugden, that if an unreasonable contract be not performed according to its letter, equity will not interfere. (Sugd. on Vend., 2 Am. edi.) Marshall, C. J., in 1825, said: "Between a contract which
25 is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the court against the party who has suffered by his inability, no clear distinction is perceived." (Garnett v. Macon, &c., 2 Brock., 246; 6 Call., 371.) This exposition of the law has, since the dismission of the bills in 1831, in Jackson v. Ligon, (3 Leigh, 161,) and in 841, in Pigg v. Corder, (12 id., 76,) been recognized and acted upon in

this court, to wit, in 1842, in Bryan v. Lofftie's adm'ors, (1 Rob. Va. R., 16,) and in 1871, in Boston v. Scheffer, (21 Grat., 495.) In the present case whether the contract was unreasonable when made, or not, it has become unreasonable before its execution.

The principle applies though the case be one of mere pecuniary objection. The case of Faine v. Browne, cited before from 2 Vessen, 307, is recognized in Pennsylvania in 1834, in Henderson v. Hays, (2 Watts, 151,) and acted upon by Ld. Langdale, in 1843, Wedgewood v. Adams, (6 Beav., 606;) and since the language of Ld. St. Leonards, in 1852, in Lumley v. Wagner, (1 De Gex, MacNaghten & Gordon, 619; 13 Eng. L. & Eq., 257,) has been recognized by him; (Sugd. on Vendors, chap. 5, § 31, p. 213 of 14th edi., published at London in 1862.)

On a bill filed to be relieved against a bargain as unconscionable, it was said by Ld. Thurlow that an inadequate consideration is not alone sufficient to vitiate the contract. (Gwyne v. Heaton, 1 Brown's C. R., 6.) But he would not assist a plaintiff who sought to carry into execution an unconscientious bargain. (Vaughan v. Thomas, id. 556; Collet v. Wollaston, 3 id., 228.) In the same year with Collier v. Brown, (1 Cox, 428,) Sir Richard Pepper Arden, afterward Ld. Alvanley, recognizing the distinction between the inadequacy required to induce the court to make the party deliver up the contract, and that which is sufficient to induce it not to decree a specific performance, did, because of the inadequacy, dismiss the bill in Day v. Newman, (2 Cox, 80.) Ld. Eldon, though doubting whether there was a sufficient difference of value to authorize the decree of dismission, did nevertheless let that decree stand in White v. Daman, (7 Ves., 34.) He did not think there was such inadequacy as to be of itself sufficient ground for setting aside the contract in Low v. Burchard, (8 Ves., 133,) or for refusing specific performance in Coles v. Trecotterick, (9 Ves., 246;) but undoubtedly if the bill before him in 1804 had been for specific performance he would have refused, for there he thought the terms so extremely inadequate that the court should order the instruments to be delivered up. (Underhill v. Horwood, 10 Ves., 219.) Certain it is that he left the plaintiff to his remedy at law in Mattock v. Buller, (id., 312.) Sir William Grant thought the contract could not be "set aside," in Burrowes v. Lock, (id. 474;) but Ld. Erskine deemed the inadequacy of consideration strong evidence against the purchaser in Lowther v. Lowther, (13 id., 103.) On a bill to declare the instruments void the decree was made in Picket v. Loggin, (14 Ves., 240.) On a like bill Ld. Eldon, in 1806, used this language: "There are many cases in which the
26 court will not disturb an agreement that has been executed, though it would have refused to carry that agreement into execution; and there are also many cases upon the other point where, refusing to execute an agreement, it will leave the party to make the most of it at law, (where a jury may determine, upon all the circumstances, what shall or shall not be given as damages;) and there is a third class of cases in which the court, refusing to carry the agreement into execution, would not stand neuter, but would order it to be delivered up." (Willan v. Willan, 16 Ves., 83.) As to the second class of cases the same principle is recognized in 1809 by Tucker, J., in Virginia, in Jones' Devisees v. Roberts, (4 H. & M., 441, and by Tilghman, C. J., in Pennsylvania, in Campbell v. Spencer, 2 Binn., 133.) And when the bill for specific performance before Sir William Grant, in 1811, was dismissed by him, he rested his decision upon the ground of its not being "a case where the court is called upon to rescind an agreement and to decree the conveyance executed in pursuance of it to be deliv-

ered up to be cancelled, which would admit a different construction." (Cadman v. Horner, 18 Ves., 11.) Quite consistent with this case and with the opinion of Sir Thomas Plumer in Martin v. Mitchell, (2 Jac. & Walk., 420,) was the action of Ld. Eldon, in 1821, when, on a bill to set aside a purchase, he admitted that in general a sale will not be set aside on the ground of inadequacy of price, yet said there may be cases of inadequacy so enormously great as to form a ground for cancelling the contract; and on the ground of such inadequacy he sustained an order for the appointment of a receiver. (Stilwell v. Wilkins, Jacob., 282, 4 Cond. Eng. Ch. R.) Notwithstanding inaccurate language in Fry on Specific Performance, § 281, it is insisted that a greater degree of inadequacy is required to rescind a contract than is sufficient to refuse specific performance; that there may be such unreasonableness in the contract as may be sufficient for such refusal in the latter case and yet be insufficient to rescind the contract. (Clitherall v. Ogilvie, 1 De Sauss., 260; Thompson v. Jackson, 3 Rand., 505; 2 Tuck. Com., 464.) "Equity will be as vigilant in discovering an excuse for refusing to perform the contract where the price is inadequate, as it will when the consideration is unreasonable." Such is the language of Ld. St. Leonards in the latest (the 14th) edition of Sugden on Vendors, ch. 7, § 11, pp. 274–'5.

The cases were reviewed in South Carolina in 1866, by De Saussure, J., on a bill to set aside sales in Butler v. Haskell, (4 De Saus., 688;) and in New York, in 1822, by Chancellor Kent on a bill for specific performance in Seymour v. Delaney, &c., (6 Johns. Ch. R., 222.) In the court of errors, Savage, C. J., concurred with him, (3 Cow., 517;) and nine senators concurred in the opinion of the chief-justice, (id., 522.) Sudam, senator, though recognizing Willan v. Willan, and the distinction therein between a refusal to disturb an agreement that has been executed and a refusal to decree specific performance, (3 Cow., 530,) did not "assent to the doctrine that inadequacy of price may, of itself and without fraud or other ingredient, be sufficient to stay the application of a court of chancery to enforce a specific performance of a private contract to sell land," (id. 532-'3,) saying that "from the doubts and disapprobation of Sir William Grant, the master of the rolls, and of Ld. Eldon, he felt himself warranted in saying that the point is unsettled in England," (id. 533;) and considering the conflict of evidence—considering also that the transaction in question was for the exchange of real property and wholly different from that of a cash sale—he was of opinion to reverse the chancellor's decree dismissing the bill for specific performance; and thirteen senators concurred with their colleague in such reversal. (Id. 536.) The chancellor's opinion, supported and enforced by the chief-justice, might well be regarded beyond the limits of New York as outweighing what was thought by five senators, even if they were more distinctly opposed than they appear to be. (Willard's Eq., ch. 4, § 1, p. 264.) Accordingly, in 1841, the principle as laid down by Chancellor Kent was regarded in Alabama as established. Gould v. Womack and Wife, 2 Alab. N. S., 95. In Virginia, in the same year, Tucker, P., said: "A decree for specific performance being a matter of discretion, a court of equity will never make it when the consideration is inadequate, but will leave the party to his action for damages for the breach of the contract." Pigg v. Corder, (12 Leigh, 83.) In South Carolina, in 1848, upon a full review of authorities, the conclusion of Chancellor Kent as to inadequacy of price was recognized and acted upon. Gasque v. Small, (2 Strob. Eq. R., 80.) And now, in a treatise by one lately a justice of the supreme court of New York, it is laid down that "in this country the

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weight of authority is that though equity will not set aside an executed agreement for inadequacy of consideration, not amounting to evidence of fraud, yet it will in private sales refuse its aid to carry it into execution, though the inadequacy be not sufficient to set it aside." (Willard's Eq., ch. 4, § 1, p. 266.) In England now the distinction is no less marked than in former ages between what is necessary to resist a suit for the specific performance of a contract and what is necessary to support a suit to set aside a deed. (Vigers v. Pike, 8 Cl. & Fin., 645.) Since Bower v. Cooper, (2 Hare, 411,) to wit, in 1845, Sir James Wigram held the plaintiffs "were not entitled to a specific performance of the agreement, the effect of which would be to give them the estate at a price, according to the evidence, very much below its value," and the bill for specific performance was dismissed. (Playford v. Playford, 4 Hare, 551, 30 Eng. Ch. R.)

The Supreme Court of the United States did, indeed, in 1830, use language which has been copied in 2 Story's Eq., § 751, and 21 Grat., 80. But, at the very time of using that language, the Supreme Court also said that when a party comes into a court of chancery seeking equity he is bound to do justice, and not ask the court to become the instrument of iniquity; "that when a contract is hard and destitute
28 of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it." (King, &c., v. Hamilton &c., 4 Peters, 328.) Similar language is used elsewhere, (Brown v. Harris, 11 Ohio, 9, 10; Webb v. D. London & Portsmouth R. C., 1 De Gex, Macnaghlen & Gordon, 530, 16 Jur., 323; 21 Law. J. Rep. N. S., ch. 337; 9 Eng. L. & Eq., 253; Boone vs. Missouri Iron Co., 17 How., 343–4; Watson vs. Marston, 31 Eng. L. & Eq., 173; Gentry v. Rogers, 40 Alabama, 448.) And it is admitted by this court that "inadequacy of consideration is always a material circumstance to be considered along with other circumstances existing in a case conducing to show that it would be inequitable to enforce the specific execution of a contract." (Hale v. Wilkinson, 21 Gratt., 81.) If it be said that it was the misfortune of the vendor that the sums received by him in Confederate States treasury notes were all invested in Confederate States bonds, (p. 118,) the answer is still, that for the valuable property sold for $77,000, the value of what the vendee paid on account of the two first instalments, $17,000 and $30,000, did not, at the time of paying the same, exceed $14,000, (pp. 39 and 71;) and in respect to the other instalment, $30,000, what the vendor received was by means of the credit which his own endorsement gave to the bills; and the value of what he so received could not exceed the amount of those bills, and they were dishonored; and he, on his endorsement, was liable for a greater value than he so received. Moreover, in the present case the inadequacy of consideration does not stand solitary and alone, but is to be considered along with the other circumstances, prominent among which are the vendee's default and misrepresentation, all of which combine to show that "a decree for specific performance of his speculating bargain would be unjust and inequitable." (Rogers v. Saunders, 16 Maine, 100; Young's Administrator v. Rathbone, 16 N. Jersey, 1 C. E. Green, 228; Merritt v. Brown, 19 id., 222.) Clear it is that the ends of justice cannot be attained by such a decree as the special court of appeals has made. For this would be to permit the vendee "to reap the advantage of his own default, and to have the title of the land confirmed to him for a grossly inadequate price." (Carter v. Ragland, 21 Gratt., 577.)

The present is the case of a vendee not only destitute of equity, on

the grounds before mentioned, but a vendee who has brought his suit sooner than is authorized by the very terms of the agreement under which he claims. For the vendor could not be required to make a conveyance of the premises before the period at which he was to give the same up. And, according to the agreement, he could not be required to give up the premises until "one month after the termination of the war," (p. 21.) Yet this suit was brought the 16th of October, 1865, being long before the termination of the war, (p. 21,) as settled by the legislative, executive, and judicial departments of the Government of the United States. (14 Stat., 811; id. 814; United States v. Anderson, 9 Wallace, 70; The Protector, id., 687; 12 Wallace, 700; Brown v. Hiatts, 15 id., 177.)

29 And moreover there is in the vendee's case nothing to shew that satisfaction in the form of damages is not an adequate remedy for him, as insisted on in the answer, pp. 38, 39; (Harnett v. Yeilding, 2 Sch. & Lefr., 560;) nothing to shew that this land is of any particular value to him. (Mason v. Armitage, 13 Ves., 37.) It is not admitted that he entered into the agreement of January, 1863, from a desire to settle on the land, (p. 25.) Even if it appears to be contiguous to other land of his, yet that has been advertised for sale, (pp. 198, 199.) Compensation in money would be a perfect satisfaction. (Sears v. Boston, 16 Pick., 359.)

The vendee, who appears to be a foreigner, and does not appear to have been naturalized, (pp. 151, 155, 157,) may well be supposed to have been speculating, to have thought of the disadvantages which aliens lie under, (Bac. Abr. Tit. Aliens, 6;) and to have looked not to taking for the benefit of the Commonwealth, (Burk v. Brown, 2 Atk. 398,) but to selling according to the Code of Virginia, ch. 115, § 3, p. 498 of edi. of 1849. Though "in the case of a mere executory contract for a purchase of land while it yet remains in fieri no forfeiture accrues," (Tucker P. in Hubbard v. Goodwin, 3 Leigh, 514,) yet an alien who may not have a real action (1 Bac. Abr. Tit. Aliens, B,) cannot maintain a suit in equity for specific performance of a contract to convey to him real estate. Since Mitf. Pl., 229, Story's Eq. Pl. § 724, and 1 Dan. Ch. Prac., 523, 2 id., 718, Mr. Spence has said, "As regards the right of an alien friend to sue, equity follows the law; an alien cannot hold real property in this country, therefore he cannot sue, in respect of it." (2 Spence's Eq. 14.) So recently as 1845, Sir Lancelot Shadwell thought "this court would not do so idle a thing as to hear an alien insist that there was a trust for him, when it would know at the same time that he could not have any benefit from it." It seems to him there would be no violation of any principle of justice in refusing to let him have property which he could not hold. (Barney v. McDonald, 15 Sim., 14, 38 Eng. Ch. R. See also, in 1852, Knight Bruce, L. J., in Webb v. Railway Co., 1 De Gex, Macnaghlen & Gordon, 525.) A court of equity is to enforce the contract as was authorized by the laws in force when that contract was made and was to be performed. It is not to give to subsequent laws of the State an effect that would be inconsistent with the tenth section of the first article of the Constitution of the United States.

The objections to Denton v. Stewart, (1 Cox 258,) were, after Bennet College v. Carey, (3 Brown's Ch. R., 390,) and Mortloch v. Buller, (10 Ves., 319,) clearly pointed out by the master of the rolls in 1806. (Greenaway v. Adams, 12 Ves., 401.) After this case and Gwillem v. Stone, (14 Ves., 128,) Denton v. Stewart was seriously questioned by Ld. Eldon in Todd v. Gee, (17 Ves., 278.) Chancellor Kent, after Phillips v. Thompson, (1 Johns. Ch. R., 114,) had regard to this in Hatch v. Cobb (4 id., 50,) and

Kempshall v. Stone, (5 id., 195.) In Virginia the plaintiff was left to his remedy at law in Sims' Administrator v. Lewis' Executor, &c., (5
30 Munf., 31, 2 Tuck. Com. 466.) Subsequently to Williams v. Edwards, (2 Sim. 78, 2 Cond. Eng. Ch. R.;) Lamb v. Smith, (6 Rand. 552;) and Payne v. Graves, (5 Leigh 561,) to wit, In 1839, the principle was well established, and alike in Virginia, Gibbons v. Jackson, (10 Leigh, 379,) and in England the decree of the master of the rolls dismissing with costs the bill in Sainsbury v. Jones, (2 Beav. 462, 17 Eng. Ch. R.,) being affirmed by Ld. Cottingham. He observed that for a short time Sir William Grant's decree in Greenaway v. Adams added something to the authority of Denton v. Stewart, although he threw out strong doubts as to the authority of that case. This, however, lasted but a short time, for Greenaway v. Adams occurring in 1806, Ld. Eldon in 1810, in Todd v. Gee, expressly overruled Denton v. Stewart; and Ld. Cottenham's belief is that from that time there has not been any doubt on the subject. (5 Mylne & Cr., 3, 4. See also, in 1844, Wedgewood v. Adams, 8 Beav. 103.) The present case, wherein there is no such prayer in the bill (Foster v. Cook, 1 Hawks, 511) as there was in 1849 in Bowles v. Woodson, (6 Gratt. 89,) is governed by the general principle established in Virginia in Gibbons v. Jackson, and in England in Sainsbury v. Jones; and is unaffected by any such statute as that of 21 and 22 Vict., c. 27, § 2, cited in Lewers v. Earl of Shaftsbury, (Law. R., 2 Eq. Cas. 70.) Under a general prayer there cannot be given relief that is different from or inconsistent with the case made by the bill, (2 Rob. Va. Pract., 292–'3; 1 Dan. Ch. Pract., ch. 6, § 4, p. 376, and § 5, part 8, p. 435 et seq.; Rochester v. Anderson, Littell's Select Cas., 16.) The bill containing no alternative prayer for a return of so much of the purchase-money as has been paid, it could not, upon the prayer for general relief, be decreed here, any more than in Holt and Wife v. Rogers, (8 Peters 434,) or Hobson v. McArthur, (16 id. 195.) Such a general decree of dismissal as was made in these two cases is equally proper here. Costs should be awarded against the vendee and and due restitution made to the vendor.

All of which is respectfully submitted by the petitioner.

By CONWAY ROBINSON,
One of his Counsel.

FEBRUARY 21, 1874.

We, counsel of the supreme court of appeals of Virginia, certify that, in our opinion, it is proper that the decision mentioned in the foregoing petition should be reviewed by said court.

CON. ROBINSON.
JAMES ALFRED JONES.
WM. J. ROBERTSON.

31 *No 2 A referred to in petition.*

The Commonwealth of Virginia to the sheriff of Fauquier County, greeting:

We command you that from all further proceedings on a decree of the circuit court of Fauquier County, rendered on the 13th of September, 1867, in a cause in chancery depending between Gustavus Lersner, plaintiff, and Robert B. Bolling, defendant, you altogether supersede; which decree, before the judges of our district court of the fourth judicial district, at the court-house in the town of Fredericksburg, for cause of error in the same to be corrected, on the petition of the said Gustavus Lersner, we have caused to come.

We also command you that you give notice to the said Robert B. Bolling that he be before the judges of our said district court at the court-house aforesaid on the 15th of December next, then and there to have a rehearing of the whole matter in the decree aforesaid contained. And have then and there this writ.

Witness, William E. Straight, clerk of the said district court, at Fredericksburg, the 13th day of September, 1869, and in the ninety-fourth year of the Commonwealth.

W. E. STRAIGHT, *C. C.*

Memorandum.

The above writ of supersedeas is not to be effectual until the petitioner shall enter into bond with sufficient security in the clerk's office of the said circuit court of Fauquier County, in the penalty of fifteen hundred dollars, conditioned as the law directs, and a certificate of the execution thereof, together with the names of the security, shall be endorsed hereon by the clerk of the said court.

W. E. STRAIGHT, *C. C.*

The petitioner, Gustavus Lersner, has entered into bonds in the penalty and with the condition mentioned in the within memorandum, with R. A. Hillyard as his security, who justified as to his sufficiency.

Teste:

R. L. REILLY,
Clerk of Fauquier Circuit Court.

Copies. Teste:

GEO. L. CHRISTIAN,
Clerk Supreme Court of Appeals.

JANUARY 21, 1874.

32 *No. 2 B referred to in petition.*

Know all men by these presents that we, Gustavus Lersner and R. A. Hillyard, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of fifteen hundred dollars, for the payment whereof we bind ourselves and our heirs, jointly and severally, firmly by these presents, sealed with our seals and dated this 11th day of Nov'r, 1869.

The condition of the above obligation is, that whereas the above-bound Gustavus Lersner has sued out of the district court of the fourth judicial district, at Fredericksburg, a writ of supersedeas to a decree of the circuit court of Fauquier County, pronounced on the 13th day of Sept'r, 1867, in the suit in chancery then pending therein in the name of the said Gustavus Lersner, as plaintiff, against Robt. B. Bolling, deft.:

Now, if the said Gustavus Lersner shall perform and satisfy the decree aforesaid, if the same shall be affirmed by the said district court or the supersedeas aforesaid be dismissed, and shall also pay and satisfy all such costs as shall be awarded against him and all such damages as shall be incurred in consequence of the supersedeas aforesaid, in case the same shall be dismissed or the decree aforesaid be affirmed, then this obligation is to be void; otherwise to remain in full force.

G. LERSNER. [SEAL.]
R. A. HILLYARD. [SEAL.]

STATE OF VIRGINIA, *City of Richmond, sct:*

This day R. A. Hillyard made oath before me, a justice of the peace in and for the city aforesaid, in the State of Virginia, that his estate, after the payment of his just debts and those for which he is bound as security and expects to have to pay, is worth at least the sum of fifteen hundred dollars.

Given under my hand this 11th day of Nov'r, 1869.

W. T. KENDRICK, *J. P.*

CLERK'S OFFICE OF FAUQUIER CIRCUIT COURT,
6th Feb'y, 1874.

The above is a copy of supersedeas-bond now on file in the papers in the chancery cause of Lersner vs. Bolling, lately pending in said court.

Teste:

JOHN S. BYRNE, *Clerk.*

33 *No. 3 referred to in petition.*

VIRGINIA:

In the supreme court of appeals, held at the State court-house in the city of Richmond, on Friday, the 19th day of April, 1872.

In pursuance of the first section of the act of the general assembly entitled "An act to provide a special court of appeals," approved February 28, 1872, the court doth certify to the said special court of appeals, to be tried or disposed of by said special court, the following fifty causes now pending on the docket of this court, viz:

1. John E. Wardsworth & als., plaintiffs, against M. C. Goodwyn, sheriff, &c., & als., defendants.
2. W. W. Aurey, admr. of Alex'r Yuille, dec'd, plaintiff, against Elijah D. Hundley, defendant.
3. Richard A. Claybrook, appellant, against H. B. Scott & als., appellees.
4. Wm. N. Waldrop, admr. of German R. Glinn, dec'd, appellant, against William R. Glinn & als., appellees.
5. Henry T. Sparks, exr. of Charles Hume, dec'd, appellant, against Hay Taliaferro & als., appellees.
6. Thomas T. Kempe, appellant, against William M. Buskey & als., appellees.
7. McClersh, Rives & Co., appellants, against John W. Broadnax & als., appellees.
8. Thomas Branch & Sons, plaintiffs, against O. S. Baldwin, defendant.
9. The City Savings and Ins.. Co. of Petersburg, &c., appellants, against B. D. M. Jones, appellee.

34 10. Conant & Hunter, plaintiffs, against E. H. Lassiter, defendant.

11. Rosina Noble & als., plaintiffs, against Nancy Harris & als., defendants.
12. Henry Stokes & als., plaintiffs, against John B. Oliver, defendant.
13. Cary Hudson & als., appellants, against J. R. Burwell, admr., & als., appellees.
14. Charles H. Whitehurst, personal representative of Daniel White-

hurst, dec'd, & als., appellants, against James O. Whitehurst & als., appellees.

15. Susan Sanford, g'd'n, &c., & als., appellants, against N. S. Edmunds, & als., appellees.

16. Allen Howard, plaintiff, against A. R. L. Kelling & John J. Burroughs, defendants.

17. The New York Life Insurance Co., plaint'ffs, against Mary M. White, admx. of John S. White, dec'd, defendant.

18. Harvey, appellant, against Robertson's Exor., and als., appellees.

19. L. N. Peterson & als., appellants, against A. T. Herbert & als., appellees.

20. Charles E. Gibbs, appellant, against Charles Tiernan, appellee.

21. Robert McCandlish, plaintiff, against Edward Camm, defendant.

35 22. Bernard Briel, exor. of John Brauer, dec'd, appellant, against Sarah A. Brauer & als., appellees.

23. Garinter Barker, appellant, against A. Austin Smith & als., appellees.

24. Thomas Hat. Kellam, appellant, against Richard J. Ayres, appellee.

25. Daniel J. Hartsook, appellant, against Benjamin S. Staton, appellee.

26. John Young, appellant, against Samuel Thompson & als., appellees.

27. The Insurance Company of the Valley of Va., appellant, against Samuel O. Clark & als., appellees.

28. Anne S. George, appellant, against John W. George & als., appellees.

29. Elizabeth M. Strother & als., appellants, against Wm. M. Hume, sheriff, and admr. of John Strother, dec'd, and others, appellees.

30. John H. Colston, plaintiff, against Susan Quander, defendant.

31. Edward J. Lloyd, admr. of John Lloyd, dec'd, plaintiff, against John L. Pascoe, admr. of Joseph Smith, dec'd, defendant.

32. Elizabeth C. Herndon & als., appellants, against John W. George & als., appellees.

33. Gustavus Lersner, appellant, against Robert B. Bolling, appellee.

36 34. William F. Brockenbrough, admr. of John F. Brockenbrough, dec'd, and als., appellants, against John M. Brockenbrough, admr. de bonis non of Austin Brockenbrough, dec'd, & als., appellees.

35. Semple Ellett, appellant, against John H. Blunt, appellee.

36. William T. Harrison & als., appellants, against Charles T. Fisher & als., appellees.

37. William T. Hart & als., appellants, against George S. Haynes & als., appellees.

38. Samuel G. Mattox & als., appellants, against Jeremiah Barber & als., appellees.

39. The Portsmouth Insurance Company, plaintiff, against A. G. Brinkley & Co., for, &c., defendants.

40. Thomas T. Giles, plaintiff, against Mary Wilson and als., defendants.

41. Charles H. Armistead & als., plaintiffs, against Edward D. Withers, defendant.

42. The same, plaintiffs, against the same, defendant.

43. Coleman D. Bennett, appellant, against Ellen A. Claiborne, appellee.

44. William Badgett, plaintiff, against Winslow Robinsin, trustee of Sarah J. Hatchell, defendant.

37 45. Alexander J. Bondurant & als., exors., &c., plaintiffs, against J. H. Rixey, ass'nee of Richard L. Patterson, defendant.

46. Thomas B. Butts and wife, appellants, against John Hughes and als., appellees.

47. Jas. A. Hamner and als., plaintiffs, against William T. Pankey, executor of Peter L. Pankey, deceased, defendant.

48. Samuel Hairston & als., appellants, against Harden Hairston, appellee.

49. Richard G. Hobson & als., appellants, against W. B. Hobson and wife & als., appellees.

50. E. J. Fowlkes and als., plaintiffs, against Ambrose B. Rucker, defendant.

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy of the order of said court assigning the first fifty causes to the docket of the "special court of appeals," which latter court was created by an act of assembly approved Feb'ry 28th, 1872; and I further certify that the term of said supreme court, at which the said order of assignment was made to said special court docket, ended on the 20th day of April, 1872.

Given under my hand this 24th Jan'y, 1874.

GEO. L. CHRISTIAN, *C.*

38 VIRGINIA:

In the circuit court of Fauquier County.

Among the records and proceedings of the said court are the following:

Be it remembered that in said circuit court on the 17th April, 1873, a paper received since the commencement of the present term in the words and figures following:

VIRGINIA:

In the special court of appeals of Virginia, January 27th, 1873.

GUSTAVUS LERSNER, APPELLANT,
against
ROBERT B. BOLLING, APPELLEE.

Upon an appeal from a decree pronounced by the circuit court of Fauquier County on the 13th day of September, 1867.

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in the said decree in rescinding the contract of the 19th of January, 1863, and in not decreeing a specific execution thereof. It is therefore considered that the decree aforesaid be reversed and annulled, and that the appellee pay to the appellant his costs by him about his appeal aforesaid here expended.

And it is further ordered that this cause be remanded to the circuit court of Fauquier County, with instructions to refer the cause to a

master commissioner to have an account taken crediting the appellee with the amount paid by him on the bills held by Caldwell, Shannon & Co., and charging him with the rents and profits of Bollingbrook and Ben Lomond from the 2d day of May, 1866, when possession thereof ought to have been delivered, under the terms of the contract; and also with the value of the personal property, which then ought to have been delivered, under the terms of the contract. And if upon the coming in of his report it should appear that there is a balance due the appellee, the said circuit court will require the appellee to convey Bollingbrook, and cause a decree to be entered conveying Ben Lomond to the appellant upon his paying such balance, after deducting the costs of the suit in the court below; but if it should appear that there is a balance due the appellant upon taking said accounts, then the said court will require such conveyance of Bollingbrook to be made, and also cause the proper decree to be entered for the conveyance of Ben Lomond to the appellant, and will render a personal decree against the ap-
39 pellee for such balance and for the costs in the said suit; but the said circuit court will not require such conveyance to be made by the appellee until the appellant, or some one for him, shall enter into bond, payable to the Commonwealth of Virginia, in the penalty of twenty-five hundred dollars, with one or more sufficient sureties, and conditioned to indemnify and save harmless the appellee from any liability on account of his endorsement of the last bill for five hundred pounds sterling held by Frazer, Trenholm & Co.

Which is ordered to be certified to the said circuit court of Fauquier County.

A copy. Teste:

GEO. L. CHRISTIAN, *C. C.*

Appellant's costs in the courts of appeals, $374.54.

Having been certified and transmitted to this court by the clerk of the court of appeals, the officer required by law to discharge the duties of clerk of said special court of appeals, as the decree of that court in this cause, the defendant, Robert B. Bolling, appeared by counsel, and resisted the entry thereof as the decree of this court, insisting that the same is null and void, for the reasons and upon the grounds stated and set forth in his written objections filed and ordered to be made a part of the record in this cause; and that therefore this court should not enter the same as its own decree, and that no execution should issue thereon, nor any proceedings be had to carry the same into effect; and the plaintiff, Lersner, by counsel, resisted the filing of said objections, and insisted that said decree should be entered. On consideration of which objections the court doth order that the said decree of the special court of appeals, hereinbefore set forth, be entered as the decision of this court. And this cause coming on to be heard on the papers formerly read, and the decree of the special court of appeals hereinbefore set forth, was argued by counsel. On consideration whereof, the court, in conformity with the requirements of the said decree of the special court of appeals, doth adjudge, order, and decree that one of the master-commissioners of this court do take an account crediting the said Ro. B. Bolling with the amount paid by him on the bills held by Caldwell, Shannon & Co., and charging him with the rents and profits of Bollingbrooke and Ben Lomond from the 2d day of May, 1866, when possession thereof ought to have been delivered, under the terms of the contract of sale in the bill and proceedings mentioned; and also with the

value of the personal property which then ought to have been delivered, under the terms of the said contract; in taking which said account said master-commissioner shall make all enquiries necessary to a proper taking of the same, and will report his proceedings to this court.

The "objections" mentioned in foregoing decree are in these words:

40 In the circuit court of Fauquier County, Va.

GUSTAVUS LERSNER, PLAINTIFF,
against
ROBERT B. BOLLING, DEFENDANT. } In chancery.

The defendant insists that this court should not enter, as its own, the decision produced as the decree of the special court of appeals; and that thereupon no execution should issue nor any proceedings be had to carry the same into effect, for this defendant insists that the said decision is null and void on the following grounds:

(1.) That from the decree made by this court on the 13th of September, 1867, there has been no appeal according to the laws of this State; that the only appeal therefrom was awarded by one W. Willoughby, who never had any valid commission or appointment as judge, but entered upon the office under color of certain acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, commonly called the reconstruction acts, and of an appointment by the general exercising military authority under the second section of the said act of the 19 July, 1867; that the said acts were each and all of them passed, not according to the first section of the first article of the Constitution of the United States, in the exercise of powers therein granted, and were not necessary or proper for carrying into execution these powers, or any powers, vested by the Constitution in the government of the United States or in any Department or office thereof, but are plainly repugnant to the fourth section of the fourth article of said Constitution, which requires that "The United States shall guarantee to every State in the Union a republican form of government;" and to the 10th article of the amendments to said Constitution, whereby, "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is now insisted that, according to the true construction of these clauses of the Constitution, the said acts of Congress are not, any of them, laws made in pursuance of said Constitution, but that each of them is invalid, and that the authority exercised under the United States by force of said acts is also invalid. And insisting on the title, right, and privilege conferred or recognized by these clauses of the Constitution, this defendant claims exemption, under said clauses, from the order of said W. Willoughby, allowing the appeal.

(2.) That the said appeal was not heard by the supreme court of appeals, but the trial thereof was by judges, sitting as a special court of appeals, under color of an act of assembly of Virginia, passed on the 28th of February, 1872; and the said act is in violation of the
41 present constitution of this State, which contemplated that in every special court of appeals there should be the same number of judges required by the act of March 31, 1848, (Sess. Acts, p. 51,) and by the constitution of 1851, art. vi, § 12, and by the act of Feb. 25th, 1854, passed in pursuance thereof, (Sess. Acts, p. 18,) the language of the constitution of 1851, as to the number of judges being the same as in the present constitution; and the true intent and meaning of each

instrument being that whenever a special court of appeals was formed, it should be formed of a sufficient number to enable five, and no more than five, judges to sit therein; and that not less than three should sit to do business.

(3.) As to the designation of judges of the special court of appeals, the intent of the constitution was not that it should be by the supreme court of appeals, but that it should be in a way analogous to that prescribed by the act of March 31, 1848, (Sess. Acts, p. 51,) or that of Feb. 25th, 1854, (Sess. Acts, p. 18.)

(4.) As to cases on the docket "which cannot be otherwise disposed of with convenient dispatch," the intent of the constitution was not that the same should be ascertained by the supreme court of appeals, but that the ascertainment thereof should be in the way prescribed by said act of March 31, 1848, or Feb. 21, 1854, or in some way analogous thereto.

(5.) This particular case should not have been certified to the special court of appeals, for it could have been disposed of by the supreme court of appeals with convenient dispatch. The magnitude of the case, involving a subject of great value, and principles of great importance, rendered it material that it should be heard by the supreme judicial tribunal of the State, a special court of appeals for which five judges had not been designated could not pass upon the constitutionality of a law, for the 2d section of the 6th article of the constitution, after providing that the supreme court of appeals shall consist of five judges, any three of whom may hold a court, expressly declares "the assent of a majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the Federal Constitution or to the constitution of the State."

(6.) The case should not have been certified to the special court of appeals, without giving to the defendant, or his counsel, an opportunity of making such objection thereto as was allowed by the act of 1847–'8, ch. 68, § 4, p. 51, and the act of 1853–'4, p. 18, ch. 17, § 1, 2. Action to remove his cause from the supreme judicial tribunal of the State, composed of five judges, to an inferior tribunal, composed of three circuit judges, was a most important step, and should not be allowed to affect him when that step was taken without giving him an opportunity of being heard in regard to it.

(7.) Under such circumstances, to give effect to the opinion of the two circuit judges constituting the majority of the special court of appeals in opposition to the opinion of another judge of that court, as well as to the opinion of the judge who made the decree of the
42 13th of September, 1867, would deprive this defendant of his property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

MARCH , 1873.

And on the 28th November, 1873, a report, and papers accompanying same, were filed in this cause, in the words and figures following:

COMMISSIONER'S OFFICE,
Warrenton, Va., 27th Nov., 1873.

In obedience to a decree of your honor's court, entered on the 17th of April, 1873, in the above-stated cause, your commissioner, after giving notice to the parties of the time and place of executing said order, submits the following:

Said order directs your com'r "to take an account, crediting the said

Robert B. Bolling with the amount paid by him on the bills held by Caldwell, Shannon & Co., and charging him with the rents and profits of Bollingbrook and Ben Lomond from the 2d May, 1866, when possession thereof ought to have been delivered, under the terms of the contract of sale in the bill and proceedings mentioned; and also with the value of the personal property which then ought to have been delivered, under the terms of the said contract. In taking which said account said master-com'r shall make all enquiries necessary to a proper taking the same, and will report his proceedings to the court."

On the next following pages will be found a statement of the account between said Bolling and Lersner, as directed in said order.

The only fact or data in the account about which there was any difficulty was the question of the proper rent to be charged for said two tracts of land.

There were seven depositions taken by each of the parties relative to this question; of course these fourteen parties differ as to the proper amount that should be charged, or as to what said farms should have rented for, the difference between the estimates of the highest and lowest being as much as that of $1,300.00. With this conflicting evidence, your commissioner took the mean rent of all these estimates, to wit, $1,925.00 per annum, for both farms, and, what is a little remarkable, the average rent of the two lowest and the two highest is with' a few dollars of this sum fixed upon by your com'r.

The said Bolling was credited with all sums paid for taxes, and for ditching and stone-fencing. These items were given in the exhibit filed with Townsen S. Bolling's deposition.

43 *Robert B. Bolling in acct. with Gustavus Lersner.*

By the value of the two drafts paid Caldwell and Shannon, £793 9s. 7d.—$4.84 to the £		3,840 43
Int. from 3d June, 1865, to 2d May, 1866		209 68
		$4,050 11
Deduct value of household and kitchen furniture, as per depositions of Addison B. Carter and Nathan Loughborough	2,750 00	
Value of one old mule, (see Bartlett Bolling's)	10 00	
		2,760 00
		1,290 11
Interest on $1,290.11 for one year		77 40
		1,367 51
Deduct value of rents for 1866-'67	1,925 00	
Less taxes paid	108 75	
		1,816 25
Balance due Gustavus Lersner		448 74
Interest on $448.74 from 2d May, 1867, to 2d December, 1873		177 25
Rents for 1867 and '8	1,925 00	
Less taxes paid	210 09	
		1,714 91

Interest on $1,714.94 91 from 2d May, 1898, to 2 Dec., 1873.			575 49
Amount of rents for 1868–'9		1,925 00	
Less taxes paid	209 99		
Amount paid for ditching and stone-fencing	330 08		
		540 07	
			1,384 93
Interest on $1,384.93 from 2d May, 1869, to 2d December, 1873			380 85
Amount of rents for 1869–'70		1,925 00	
Less taxes paid	219 50		
And amount paid for ditching	470 00		
		689 50	
			1,235 50
Interest on $1,235.50 from 2d May, 1870, to 2d December, 1873			265 63
" Amount of rents for 1870–'71		1,925 00	
Less taxes paid	363 60		
Cash paid for ditching	287 00		
		650 60	
			1,274 40
Interest on $1,274.40 from 2d May, 1871, to 2d December, 1873			197 53
Amt. of rents for 1871–'72		1,925 00	
Less taxes paid	328 00		
" paid for stone fencing	130 00		
		458 00	
			1,467 00
Interest on $1,467.00 from 2d May, 1872, to 2d December, 1873			139 36
Value of rents for 1872–'73		1,925 00	
Less taxes paid		289 65	
			1,635 35
Interest on $1,635.35 from 2d May, 1873, to 3d December, 1873			57 23
Total amount due by Robert B. Bolling to Gustavus Lersner, on rent-account up to 2d May. 1873, with interest calculated to 2d December, 1873, and of which sum $9,160.83 is principal			$10,954 17

Of course the said Bolling is responsible for the rent from the 2d May last past, to be credited by the amount of taxes paid, &c. But your com'r thought it best to stop the account at the end of the year, not taking in part of a year's rent.

The counsel for the said Bolling took several depositions with a view of showing the actual profits of said realty under the management of said defendant. Your com'r does not think such should be the basis of the charge for rent, but as all the facts will be before your honor, and if it be decided that your com'r erred, an account in accordance with the same can be made.

Your com'r knows of no other matter to which it is necessary to call the especial attention of the court.

All of which is respectfully submitted, by—

H. SHEPPERD,
Com'r in Ch'y.

To Judge JAMES KEITH,
Fauquier Circuit Court.

NOTE.—The within report does not embrace the liability of the defendant Bolling for the farming-implements, including the threshing-machine, proved by the deposition of a son of the defendant to be in the possession of said Bolling, as part of the said property embraced in his sale to the plaintiff. It is presumed by the undersigned that the said
45 articles will be delivered by said defendant to the plaintiff, upon the footing of a decree in this cause, or, if not, that the plaintiff's right to them or their value will not be effected by the failure to enter them in this account, which failure was in consequence of no specific value having been proved.

H. SHEPHERD,
Com'r in Ch'y.

Interrogatories returned with foregoing report.

LERSNER
vs.
BOLLING.

Interrogatories propounded by plaintiff to defendant in connection with the affidavit filed by defendant, before Com'r Shepperd, with a view to influencing said com'r touching the filing of his report.

1st interrogatory. When did Townsend Bolling leave this country for Europe?

2d interrogatory. When were you first aware of his intention to go to Europe; how long, or about how long before he left this country?

3d interrogatory. When did you first become apprised of what Townsend Bolling can testify to in this cause?

4th interrogatory. Are the facts to which you expect Townsend Bolling to testify known to any other person? Do you know them yourself?

5th interrogatory. What do you expect to proye by Townsend Bolling?

BROOK & SCOTT, *P. Q.*

Answers to foregoing interrogatories returned with said report.

To 1st interrogatory he answers: He left on the 12th day of July, 1873, from the port of New York.

To the 2d interrogatory he answers: He had no intention or expectation of going to Europe. Hearing tidings of the serious indisposition of a daughter then and now in Europe, late in last June, I, from Fauquier, addressed my son Townshend, a letter to Petersburg, informing him that as it was impossible for me to make the visit to Europe, for the purpose of bringing my daughter back, that he must prepare himself to undertake the mission for me very early in July. I accordingly reached Petersburg on or about the 1st of July, and arrangements having been made for the departure of my son, he left Petersburg on July the 3rd, and New York, as above stated, on July the 12th. He would have sailed on the 7th or thereabouts, on the steamer The City of Washington, on which, before his arrival, he had procured his passage, but by cable telegraph it was communicated to New York City that
46 said steamer had been foundered on the coast of Nova Scotia, on or about the 6th of July. He, in consequence of that casualty left New York as above stated, on the 12th of July, in the City of London, a steamer of the same line.

To the third interrogatory he answers: Not until Monday last did I ascertain that his books, by which I expected to make out a statement of the expenditures and receipts at Bollingbrook and Ben Lomond, were mislaid or lost, by which books I expected and believed that I could arrive at the important facts, which, in the absence of said books, he alone could supply; he being my sole agent and manager since 1865. Had I anticipated the need of my son Townsend, growing out of my failure to find his account-books, I would have substituted another son for the mission and detained Townshend, in order to produce his books,
lse from memoranda to have rendered a full and accurate statement of all disbursements and expenditures made on my farms from 1865 to this date. I have a general knowledge of my son's transactions, as my agent and clerk, but not sufficiently accurate to dispense with services nobody else can render.

To answer to 4th interrogatory, he says: He was my sole book-keeper, clerk, and manager, my other sons being either non-residents of Fauquier and engaged in business, one in Petersburg, four out of the State, and the remaining two too young to be charged with the duties with which Townshend was solely entrusted.

To answer to 5th interrogatory: I expect by him and him alone, aided by his books, to make out and render a full, detailed, and accurate account of all disbursements and expenditures made on my farms since 1865.

And further deponent saith not.

ROBERT B. BOLLING.

(The interrogatories to which the following answers constitute a reply are not found among the papers.)

To 1st question he says: I did pay them (the drafts) in New York City, soon after the war, the particular time not now recollected. I paid the same to the owner and holder of the said two drafts.

To 2d interrogatory he says: I paid their face in a draft upon the house of Messrs. Roth'childs, in Liverpool or London—I believe Liverpool—England.

To 3d interrogatory he says: I did take immediate possession of said drafts; I had them in possession and have filed them among my papers in Petersburg or Fauquier. If I find them, and diligent search shall be made for them, I will promptly deliver them for inspection. I never committed them to the care or custody of anybody, and unless, to
47 my regret, unfortunately lost, shall search for them, and if found, as before stated, promptly produce them.

To answer to 4th interrogatory he says: I had the drafts delivered to me upon the delivery of my draft on the Mess. Roth'childs. I do not remember having received any separate voucher or receipt, though possibly a receipt might have been endorsed on the drafts.

And further deponent saith not.

ROBT. B. BOLLING.

Paper filed with foregoing answers.

RICHMOND, *April* 18, 1863.

Exchange for £400.

Sixty days after sight of this, my first of exchange, (second and third of same tenor and date unpaid,) pay to the order of R. B. Bolling four hundred pounds sterling, value recd., and charge the same to acct. of

(Signed) GUSTAVUS LERSNER.

To ROBERT RAE & CO.,
Provision Dealers, Liverpool.

(Endorsed:)
Pay to the order of Caldwell & Shannon.
(Signed) ROBERT B. BOLLING.

Pay to order of Messrs. Vignor, Robertson & Co., value on acct.
(Signed) CALDWELL & SHANNON.

Pay to the order of Messrs. Brown, Shipley & Co., value on acct. steamer Alice Vivian.

VIGNOR, ROBERTSON & CO.

NEW YORK, *June 3d*, 1865.

Recd. of R. B. Bolling pay in full of the sterling bill of which the within is a true copy, and I hereby authorize Mr. Jas. A. Jones to deliver to Mr. Bolling the original bill, he having fully paid it.

CALDWELL & SHANNON.

Paper filed with said answers.

RICHMOND, *April 18th*, 1863.

Exchange for £300.

48 Sixty days after sight of this, my first of exchange, (second and third of same tenor and date unpaid,) pay to the order of R. B. Bolling three hundred pounds sterling, value received, and charge the same to account of

(Signed) GUSTAVUS LERSNER.

To ROBERT RAE & Co.,
Provision Dealers, Liverpool.

(Endorsed:)
Pay to the order of Caldwell & Shannon.
(Signed) ROBERT B. BOLLING.

Pay to the order of Messrs. Vignor, Robertson & Co., value on acct.
(Signed) CALDWELL & SHANNON.

Pay to the order of Messrs. Brown, Shipley & Co., value on acct. steamer Alice Vivian.

VIGNOR, ROBERTSON & CO.

NEW YORK, *June 3d*, 1865.

Recd. of R. B. Bolling payment in full of the sterling bill of which the within is a true copy, and I hereby authorise Mr. James Alfred Jones to deliver to Mr. Bolling the original bill, he having fully paid it.

CALDWELL & SHANNON.

Paper filed with said answers.

R. B. Bolling, esq., in acct. with Caldwell & Shannon.

1 bill of £400		£400
1 " " £300		300
2 years and 6 days' int., at 6 pr. ct		93 9 7
		£793 9 7

Received, June 3, 1865, payment in full of above amount.

CALDWELL & SHANNON.

3d question by same. What were average cows, oxen, mules, sheep, hogs, shoates, and calves worth per head in this neighborhood in the spring of 1866, say on the second day of May of that year?

Ans. Cows, I suppose, in 1866, would have sold from $40 to $60—average native cows. I bought two cows from Jno. Harper in the year of 1866, at $30 for one, $35 for the other, in gold. Average oxen would have brought two hundred dollars per yoke. I suppose mules would have brought $150 per head. Sheep would have averaged from $6 to $8 per head. Average stock-hogs I suppose would have brought from $5 to $6 per head. Shotes would have brought from $2.50 to $3.50 cts. per head. Calves would have been worth from $6 to $8 per head.

Cross-examined:

Question x 1st. Is your estimate of the annual value of the land based on what would be its annual value to an ordinary tenant?

Ans. I mean if the land had been put to rent to an ordinary tenant, it would have been worth that.

Question x 2d. In cases of ordinary tenancies, who generally furnish the grass-seeds, &c., sown for the permanent improvement of the land?

Ans. It is generally divided between the landlord and tenant, each furnishing one-half, when the renting is for a share of the crop; where it is money rent, the tenant furnishes the grass-seeds.

52 3d question. Who pays for the ordinary ditching, &c., and improvements which add to the permanent value of the estate?

Answer. The landlord pays for all the permanent improvements.

4th question. Did not Mr. Bolling cultivate this land more with reference to its permanent improvement than the only immediate or real profit to be derived from it?

Ans. I think Mr. Bolling managed property more to its improvement than to the annual profit to be derived therefrom, as the present appearance of the estate would clearly indicate, being principally kept in grass.

5 x-question by the same. Has the intrinsic value of the farm increased since the close of the war?

Ans. I think it has.

6th question. How much per acre has been added to the value of the land?

Ans. I would rather have the land by five dollars per acre now than to have had it had it been cultivated in the regular routine crops. I refer to Bollingbrook, not having seen Ben Lomond for 2 or 3 years.

7th question. Has not Mr. Bolling done a great deal of draining, ditching, and fencing, that add greatly to the value of the land?

Ans. Mr. Bolling has done a good deal of draining, which has added to the value of Bollingbrook; I do not think the fencing better than it was 1866. I have been on the place about once a year since 1866.

Examination-in-chief resumed:

1st question by counsel for G. Lersner. Which is most profitable use to put a farm well set in grass to, cultivation or grazing?

Ans. I think the mixed husbandry, farming and grazing combined, generally most profitable to the tenant.

2d question by same. What would Bollingbrook and Ben Lomond be worth as grazing-farms? What has grass rented for since 1866, in this neighborhood?

Ans. Bollingbrook would be worth from $1.50 cts. to $2 per acre, Ben Lomond at $1.00 to $1.50 cts. per acre, as grazing-farms. Good grass by the year would rent from $1.50 to $2 per acre.

3d question by same. Has grazing been a profitable business for the farmer since 1866, and was it profitable that year?

Ans. It was profitable in 1866 and 1867 and 1868 and 1869; it has not been so profitable since.

Cross-examination resumed:

1st x-question by counsel for R. B. Bolling. You do not mean to say that the land is worth the value you put upon it for grazing, for each month in the year?

53 Ans. I mean that I would give from $1.50 to $2 per acre per year for land in grass.

Furthermore deponent saith not.

JOHN A. CARTER.

Deposition of Joseph A. Gibson, taken same time as last.

1st question by Lersner, by counsel. Read the first interrogatory propounded to John A. Carter, and respond thereto.

(Question here read to the witness.)

Answer. I am, all my life. It is 15 or 20 years since I could judge of farming. Do not know how much of the land is cleared, how much in wood. I think for the two estates, Bollingbrook and Ben Lomond, $2.50 per acre a fair annual value. I mean this exclusive of wood-land. I value land that can be grazed or cultivated at this price.

2d interrogatory by same. Read the second question propounded to John A. Carter, and reply thereto.

(Question here read to the witness.)

Answer. Am a farmer; raised as a farmer, and worked on farms all my life. Have farmed for myself since the war closed. I have dealt in stock and know their value. Have not had much to do with sheep, and do not know much about value of mules.

3d interrog. by same. Value the several kinds of stock enumerated in the third question addressed to Jno. A. Carter.

(Question here read to the witness.)

Answer. An average cow was then worth $50; at that time stock was high. By the yoke, oxen were then worth from $175 to $200. Never owned a mule, nor bought or sold one, but think them worth $135. Sheep were worth about $4.50; stock-hogs were worth about $7 per head; shotes were worth $3.00, and calves from $8 to $10 per head.

Cross-examined:

1st x-interrog. by R. B. Bolling, by counsel. Has not Mr. Bolling added greatly to the intrinsic value of the land by the improvements he has made and the mode of cultivation?

Answer. I do not know much about Bolling's cultivation; he has done some ditching, and put up or repaired some plank fencing on Ben. Lomond since the war. I had rather had the land just after the war closed than now. Then it was all grass; that is not the case now. I know nothing about his improvements, nor how much fencing and ditching has been done. Have been on the farms but twice since the war; have passed on each side of Bollingbroke and on the road thro' Ben Lomond. I live beyond them.

Further this deponent saith not.

JOSEPH A. GIBSON.

54 *Deposition of Claiborne Kendal taken at same time.*

1st interrog. by G. Lersner, by counsel. Read the 1st question addressed to Jno. A. Carter, and respond thereto.

(Question here read to the witness.)

Answer. I am acquainted with the lands referred to; have known them for thirty years; do not know how much is in wood, how much cleared. I think fair value for Waterloo, for the cleared land, is $2.50 per acre. Ben Lomond is not worth more than $2.00 per acre annually; in this valuation, the landlord to pay taxes.

2d interrog. by same. Respond to the second question addressed to Jno. A. Carter.

(Question here read to the witness.)

Answer. I am, and have been for twelve years past, a farmer, on my own account; was brought up and raised upon a farm. I am acquainted with the value of stock enumerated in this question.

3d interrog. by same. Respond to the third question addressed to Jno. A. Carter.

(Question here read to witness.)

Answer. Cows were then worth $45; oxen, by the yoke, about $175; know nothing about mules; sheep were worth $5; stock-hogs were worth $6; shotes were worth $3, and calves were worth $8 per head.

Cross-examination of this witness was waived by counsel for R. B. Bolling.

Further deponent saith not.

CLAIBORNE KENDALL.

Deposition of John Carr, taken at same time.

1st interrog. by G. Lersner, by counsel. Respond to the 1st question propounded to Jno. A. Carter.

(Question here read to the witness.)

Answer. I am acquainted with Ben Lomond and with Bollingbrooke; have known them for fifty years. There is upwards of 300 acres of cleared land in Ben Lomond and upwards of 700 acres of cleared land in Bollingbrooke. Fair rent for Waterloo or Bollingbrooke is ($2,00') two thousand dollars, and ($600) six hundred for Ben Lomond, a year.

2d interrog. by same. Respond to the second question addressed to Jno. A. Carter.

(Question here read to the witness.)

Answer. Have been a farmer for thirty-five years, dealing in stock more or less all the time.

3d interrog. by same. Respond to the third question addressed to Jno. A. Carter.

(Question here read to the witness.)

55 Answer. For cows, I think $50 a low average; oxen, by the yoke, I should put at $150. I know nothing about mules, but think them worth $125; sheep, $5; stock-hogs, about $6 or $7; shotes were worth $3.50, and calves from $8 to $10 per head.

Cross-examination waived by counsel for R. B. Bolling.

Further this deponent saith not.

JOHN CARR.

The following depositions on the part of the defendant were returned with said report for Commissioner Shepperd:

Deposition of Edward C. Turner, taken 19th August, 1873.

1st question by Wm. H. Payne and Jno. S. Mosby, attys., &c. Please state where you reside, what your occupation is, and whether you know the farms of Bollingbrooke and Ben Lomond.

Answer. I reside in Fauquier County, this State, near the Plains, on the Manassas Gap Railroad. I am a farmer, and have been engaged at same since 1839. I know said farms, but do not know them very well; have not been much on them.

2d question by same. What has been the condition of the farming interests since the war, and what was the general condition just after the war with reference to a resumption of farming operations? I mean in reference to capital, stock, farming-utensils, fencing, &c.

Answer. The condition of the farming interests since the war, upon the whole, has been prosperous. We have had good crops; gotten good prices generally. I do not think just after the war there was much capital among the farmers, generally very little; little or no stock, very few farming-utensils, and the wooden fencing almost entirely destroyed in my country; stone fencing very much out of order, thrown down everywhere.

(Question and answer excepted upon the ground of indefiniteness and its being too general, by Jas. V. Brooke, atty. for complainant.)

3d question by same. If you are acquainted with Mr. Bolling's management of these farms, will you state whether they have been managed as an owner would manage them, or worked as a tenant who was seeking to make most out of the land, without reference to its permanent value?

(Question excepted to by Jas. V. Brooke, atty. for complt., on the ground that the true measure of liability for rents, issues, and profits is to be determined according to the annual value of the property in the hands of a judicious tenant, and not by the actual value of the land to the holder, nor with reference to its abuse.)

Answer. I am; have not been familiar with Mr. Bolling's management of this property, and have seen very little of his management of it; but, judging from the present face of it, I should say that it
56 had been managed by the owner, and an owner, too, who had been particularly careful of it. It certainly does not look like other farms that have been in the hands of tenants.

4th question by same. Please state extent and character of your own farming operations since the war. Compare the value of the land controlled by you with Bollingbrooke and Ben Lomond, and state what, in your opinion, would be a fair money rent from the 2d day of May, 1866, to the 2d day of May, 1873, giving your estimate of each year.

Answer. My operations since the war have been limited, compared with what they were before the war. I have been farming since 1867 only on a small farm of 299 acres. I have been farming as owner and as landlord; as the former, I raised the usual crops raised in this section of country and grazed cattle; as landlord, I rented out one farm of 460 acres, and I have other land that has been kept in grass. To say what Bollingbrooke and Ben Lomond would have rented for would require a good deal of thought. I have been renting land out, but not for money, but on shares, for one-half of the crop and one-half of the

grazing. My brother owned a farm adjoining one of mine; he rented it to Mr. Byrne, before the war, exclusively for grazing. The farm contained about 400 acres; think there was about seventy acres of wood; and he rented the farm to Mr. Byrne for three hundred ($300) dollars a year, moneyed rent. As a general thing, our lands are not quite so good as Mr. Bolling's, but this land rented to Mr. Byrne was covered with as good grass as is on Mr. Bolling's land now. It depends, in estimating the rent, as to what was to be done with the land; if it was to be skinned and gutted, it would rent for more than if it were to be kept in grass and used for grazing exclusively. If I were going to rent it to a man to cultivate as he please, I would not let him have it for less than five dollars per acre, if I were ever so anxious to rent it; but if I were renting it to be kept in grass, to be grazed, I would be satisfied at one dollar and a half, or two dollars at the outside.

(Question excepted so far as it relates to transactions before the war, or to other lands, by Jas. V. Brooke, atty. for complt.)

5th question by same. What would you willing to give as a tenant in money, bound to farm it in a husbandlike manner? I mean the two farms of Mr. Bolling.

Answer. I do not know. I cannot answer that question before thinking upon it. I cannot answer this question to-day.

6th question by same. What would be a fair rent of these places, possession to be delivered on the 2d of May, 1866, and surrendered on the 2d of May, 1867, without wheat or the chances of corn from that year, and with such opportunity of buying and grazing cattle as a tenant would have who took possession on the 2d of May, 1866?

(Excepted to by Jas. V. Brooke, atty., &c., as not pertinent to the enquiry in this cause upon the state of facts that really exist, there having been no such tenancy as the question suggests.)

57 Answer. I cannot answer that question, for I knew nothing of the property at that time.

7th question by same. What effect would the loss of an opportunity of pitching a wheat-crop, beginning your corn-crop on the 2d of May and making your preparations for grazing at the same time, have upon the value of its rental? I mean what would Bollingbrooke and Ben Lomond have brought, possession delivered on the 2d of May, 1866, for ensuing year, without any wheat—very late to prepare for a corn-crop; to buy cattle in May to be sold that year?

(Question excepted by James V. Brooke, atty., for reasons stated above.)

Ans. I would not have been willing to give as much for it by three-fourths, under those circumstances, as if there had been a wheat-crop growing and time to prepare for a corn-crop, and cattle in hand ready to put on the farm. It is a very hard matter to buy cattle after the 2nd of May; almost impossible; I mean for grazing.

(Answer excepted to by J. V. Brooke, attorney, for same reason as above.)

8th ques. by same. What amount of capital would have been necessary to a tenant to have rendered grazing upon these farms sufficiently profitable to have enabled him to have paid the rent you have stated? In other words, in putting the rental at $1.50 to $2.00 per acre, what number or amount in value of cattle would you suppose the tenant to have to justify the rent?

Ans. I am not prepared to answer that question. I must think a little about that.

9th ques. by same. In estimating the rent at $1.50 to $2.00 per acre,

did you estimate grazing as a part of the business that the tenant was to pursue in order to make the farm profitable to him?

(Question excepted by J. V. Brooke, atty., because the estimate of $2 per acre by witness was upon the basis of the lands being used exclusively for grazing.)

Answer. It was to be grazing exclusively; no cultivation, no ploughing.

10th ques. by same. What would you estimate the annual value of these farms at in money, farmed or rented, according to the usual mode in this country, beginning on the 2d of May, 1866, and continuing up to the 2d of May, 1873?

Ans. I was not well enough acquainted with said property at that time to answer that question.

11 ques. by same. From the lights before you, would one dollar and a half or two dollars per acre be a fair rental?

(Excepted to by J. V. Brooke, attorney, as leading and otherwise illegal.)

Ans. For exclusive grazing, I think it would.

58 Cross-questioned by Jas. V. Brooke, atty. for comlpt.:

1st x-ques. by same. How did the farms Bollingbrooke and Ben Lomond rank among the farms of this county in point of intrinsic and salable value, so far as your acquaintance with the lands of the county enable' you to speak?

Ans. Bollingbrooke ranks high; Ben. Lomond nothing remarkable.

2nd x-ques. by same. Taking into consideration the quality of the land and improvements, is there any other farm in the county of the same size *as of* great intrinsic and salable value as Bollingbrooke? If so, please specify any such.

Ans. I cannot answer that question.

3d x-ques. by same. Do you know any other farm in this county of like size which, in your judgment, would command a higher price?

Answer. I do not know that I do. There may be a hundred of them. I know very little of the farms lying in that neighborhood.

4th x-ques. by same. Do I understand you to sáy, from your knowledge of the lands of this county, that you would consider it probable that there are a hundred farms in this county containing the same quality of land as Bollingbrooke, which would command as high a price?

Ans. I do not think that it's probable that there are a hundred farms equal to it in price.

5 x-ques. by same. Supposing a party-tenant to have been in possession of said farms on the 2d of May, 1866, with previous opportunity to pitch his corn-crop and purchase his cattle, with the opportunity of sowing his wheat-crop that fall, and so cultivating until the 2nd of May, 1873, with the privilege of gathering his wheat-crop sowed in the fall of 1872, what would be a fair rent per annum for said farms upon such terms as to cultivation as a judicious landlord would require in his contract of renting?

Ans. I cannot answer that question. I do not remember what things were selling for and what was made upon cattle. To go back that far, I cannot tell what it was worth.

6 x-ques. by same. You have estimated the annual value of the farms at from $1.50 to $2 per acre, if used for grazing purposes only, while you have said that you would not rent it to a tenant to cultivate as he pleased for less than $5 per acre. Now, please state, if you can, sup-

posing the condition of the farms to have been as good on the 2nd day of May, 1866, as they now are, what would, in your judgment, be a fair rent for them to a tenant, with the privilege of such judicious cultivation as I have referred to in my last question?

Answer. I am a poor judge of such things and this mixed business of cultivating and grazing. I do not know what would be a fair rent.

59 7 x. Would not the farm, under such a system of renting, produce a higher annual rent than if rented for grazing purposes only.

Answer. I should think it would; think it would be worth considerably more—a good deal more. I would rather take it one-third less than to rent it to a man to farm it as he pleased.

8th question by same. Are not some farms cultivated by their owners in such manner as that they are improved in value, while they yield a return from their cultivation? If aye, will you state, if you can, how much more these farms would be worth per annum, under such a system of cultivation, than if not cultivated at all, but only grazed?

Ans. Yes, sir, some farms do yield a return in money while being cultivated by their owner, to the improvement of the same. I could not answer the latter part of the question.

Examination-in-chief resumed:

1st question by W. H. Payne, attorney. Do I understand you to say, that in increasing the rent you diminish the value of the estate; in other words, when you estimate land as being worth a rental of 4 or 5 dollars per acre, is it not at the expense of its intrinsic value?

Ans. I think it is.

And further deponent saith not.

EDWD. C. TURNER.

Deposition of Nathan Loughborough, taken at same time as last.

1st question by same. Where do you reside? What is your occupation, and how long have you pursued it? How far do you live from Bollingbrooke and Ben Lomond, and are you well acquainted with them?

Ans. I live near Upperville, in this county. I am a farmer, and have been engaged in the business since 1838. I live about two miles from Mr. Bolling's residence on Bollingbrooke. I am very well acquainted with Bollingbrooke, but not so well with Ben Lomond. These two farms are adjoining each other.

2d question by same. How has Mr. Bolling managed these farms since the war; have they been worked and injured, or improved?

Answer. They have been very little worked since the war, and have been improved, because some fields which at the close of the war were not in grass, having been cultivated in corn, have since been sowed in grass-seed.

(Question and answer excepted for same reasons as before given, by Jas. V. Brooke, atty., &c.)

3d question by same. What, in your opinion, would be a fair

60 rental of these two farms, beginning on the 2 of May, 1866, for each succeeding year, to 2d May, 1873, taking into consideration the lateness of the season at which the tenancy begins?

(Excepted by Jas. V. Brooke, atty.)

Answer. It is a difficult question to answer, and would depend very much upon the manner in which the land was to be worked. If it should be under restriction, and to be grazed almost exclusively, as this land

has been, I should think that two dollars an acre for the cleared land on Bollingbrooke, and a dollar and a quarter per acre of the clear' land on Ben Lomond, would, in my opinion, be a fair rent.

3d question by same. What would you estimate the rent for the first year, beginning as late as May 2d, 1866, and ending 2d May, 1867?

(Question excepted by Jas. V. Brooke, upon the same grounds as that in former deposition.)

Answer. I cannot even form an estimate of the value of land rented under such circumstances.

4th question by same. Would the land be worth as much per acre for that year as it would under the ordinary mode of renting?

Ans. I should think not—certainly not.

5th question by same. Please read the 7th question propounded to E. C. Turner, and Mr. Turner's answer to the same question, and say whether you concur or not with him.

(Question excepted as being out of the order of examinations and illegal, and for same reasons appended to said question. J. V. Brooke, atty.)

Answer. I concur with his answer.)

(Answer excepted by J. V. Brooke, atty., &c.)

6th question by same. What would such an estate as Bollingbrooke and Ben Lomond rent for without cattle, supposing the tenant to be under proper restrictions in regard to cultivation?

Answer. I cannot say.

7th question by same. You have stated that the farm has been improved under Mr. Bolling's management. Will you state how much per acre you estimate the land to have been increased in intrinsic value since the war—May, 1866?

Answer. I think it is worth ten dollars an acre more now, because a great deal of the land which was then left bare, after cultivation in corn, was sown in small grain and grass-seed, is now in grass, and that which was already in grass has been improved, because it has been grazed lightly; that is, the earth always covered with grass.

8th question by same. Will you state whether the breadth of grass has been increased?

Answer. It has been greatly increased.

61 Cross-questioned by James V. Brooke, atty. for complt.:

1 x-question by same. Are you the same Nathan Loughborough whose deposition, taken in Aug., 1866, is filed in this cause?

Answer. I am.

2nd x-question by same. In that deposition you say the buildings and fencings (on Bollingbrooke) are in good order and very fine. Please state whether they have continued since that time in like condition.

(Defendant's counsel.)

Answer. The fencing on the main road is good now, though some of the cross-fencing may have some gaps in it fallen down in some places.

3rd x-question by same. In speaking of the fencing upon the place, especially the inside fencing, could you describe it now as you did then, as being in good order and very fine?

Answer. No, sir, I could not; but it is in fair order.

4th x-question by same. In the same deposition which has been just shown you, you say the barn, a very large one, with the extension-sheds, is still unfinished, "that is, the center of it, the sheds are completed." Can you state whether the then unfinished part of the barn has ever been completed or finished?

Answer. It has not.

5 x-question by same. Please state the nature and extent of the deficiency in the completeness of the barn.

Answer. I have never examined the barn; in passing by noticed that in the center it had no roof; it is a large barn; it had rafters up.

6 x-question by same. Would not, as a natural consequence of the said building remaining uncovered for the last seven years, be to impair its value?

Answer. I should think it would.

7th x-question by same. Can you form an estimate of the number of acres on these two farms in grass, putting Bollingbrooke at 769 acres and Ben Lomond at 341 acres.

Answer. The only way of estimating the grass-land on Bollingbrooke is to take from the cleared land a field said to contain (40) forty acres, and is corn and another field of about sixty (60) acres, which was in wheat, the rest of the cleared land is in grass. I do not know how much of Ben Lomond is in grass.

8th x-question by same. Please say if you have known of any renting of grass land in that neighborhood for grazing purposes; and, if aye, what have been the prices given?

Answer. I know that grass has been rented in my neighborhood; but do not know at what price, except in my own case, when I took forty head of cattle at one dollar and fifty cents each per month; this was April, this year, up to July.

9th x-question by same. What is the quality of grass on these
62 farms; what proportion would the number of acres have to the number of cattle which could be judiciously grazed upon them?

Answer. I can't speak for Ben Lomond, but the quality of the grass on Bollingbrooke is very fine. It would depend entirely upon the season as to the number of acres to the cattle grazed; in a fine season two acres would support a small bullock.

10 x-question by same. Please state during how much of the year the grazing season lasts?

Answer. I would say from May to October, inclusive.

11 question by same. Read the 5 x-question propounded to Edwd. C. Turner, and answer the same.

Answer. (The question was read by the witness.) I could not answer what the land would be worth for a money rent, to be cultivated. I cannot answer the same.

Examination-in-chief resumed:

1st question by same. Is not the matter of renting grass one of great uncertainty; may you not get a tenant this year and none the next? Is it, in other words, a regular business?

Answer. It is very uncertain, for in the year 1867 and 1868 I could rent no grass, my fields were idle.

2nd question by same. Are not the rentings of grass for *a* short periods until the cattle eat the grass down, and then you are left without a tenant?

Answer. In answer to this I can only speak of my own experience; I could never rent but for a short time, this year for the longest continuous period, for three months.

3d question by same. Do you mean to say that the owner of Bollingbrooke could expect a dollar and a half a month for every bullock he could grass as a regular business?

Answer. I do not expect that he could calculate on getting cattle to

graze the whole season; many times it is mere chance that you get them at all.

4th question by same. Has not Mr. Bolling erected since you gave your former deposition in this case cross-fencing on Bollingbrooke around the house field, pole-cat field, and mill-dam field?

Answer. Yes, sir; I think he has.

1st x-question by same. Please state whether these fences were new fences; and, if so, what fields were fenced when you gave your deposition.

Answer. I do not think they were new fences; that is, out of new stone, newly hauled, but were out of old material newly set up and arranged; I am not positive as to that, fences having been reset.

2d x-question by same. Please state whether the grazing of cattle belonging to owners of land has been a profitable or unprofitable business since May, 1866, taking the average of years?

63 Answer. I cannot answer from my own experience until the year 1869, when I grazed a lot of cattle. My profits that year were small. In 1870 I had no cattle of my own; in 1871 I grazed 80 head of cattle, and made a clear profit of $150. Last year I grazed a lot of cattle, and made a good profit. The year 1871 was a peculiarly bad year to graziers. The profits last year on 75 cattle was about $25 per head.

Examination-in-chief resumed.

1st question by W. H. Payne, atty., &c. In order to conduct the cattle business, is it not essential that there should be surplus capital over and above what is necessary for ordinary farming; and what was the condition of this country in 1866 in reference to capital, and what has been its condition from that time?

Answer. I think there should be. I do not know what the condition of capital was in 1866, except that I could not borrow any.

2d question by same. Had we not just had a war, and had we any currency left after the war that was recognized as legal; had we not lost all our slaves, all the stock, farming *farming* utensils; had not the crops been all swept from the country? And, if so, please state where the money came or was to come with which men were to speculate with cattle.

(Question excepted as leading and irrelevant by J. V. Brooke, atty., &c.)

Answer. We had just had a war; at the close of this war we had no legal currency; we had lost all our slaves; the stock and farming-utensils were general lost, in my neighborhood; the crops were swept from our country. I do not know where the money was to come from.

3d question by same. Has the country recovered from the condition you have just described; and is capital generally accessible now?

Answer. I do not think it has entirely recovered. I cannot answer that question; don't know.

Cross-question by same:

1 x-question by same. Do you mean to say that in May, 1866, there was no lawful currency circulating in this country; no stock and farming implements in the possession of the farmers in your neighborhood; and that money could not be got, or contracts made for the purchase of cattle at and since that time? As matter of fact, have not large numbers of cattle been imported into this country every year since that period, and largely purchased by the farmers of this county?

Answer. I did not mean to say that in 1866 there was no currency.

I said at the close of the war, and did not mean 1866, but the year before; my whole answer referred to that period. In the fall of 1866 there were very few cattle brought into our neighborhood; in 1867 there
64 were more, but not near a full supply; and not until 1868 did a full supply come. Since 1868 large numbers have been brought in; some years more and some less; they have been generally bought by the farmers, those who had the means to buy. In 1866 and 1867 very few bought, because there were few to buy; since 1868 more have been purchased.

2d question by same. Please say whether, since 1868, the cattle business has been a trifling or large business in the aggregate in this county.

Answer. It has not been a large business; not near so large as it was before the war, in my opinion.

Examination-in-chief resumed:

1st question by same. Has not the falling off been due to the want of capital and cattle?

Answer. I think it has been due to both of these causes.

And further deponent saith not.

N. LOUGHBOROUGH.

Deposition of A. S. Payne, taken at same time.

1st question by same. Please state where you live; what your business is. Are you acquainted with the farms Bollingbrooke and Ben Lomond; and, if so, what, from your opinion, would be a fair money rent for these farms per annum, from the 2nd of May, 1866, to 2nd May, 1873, distinguishing each year, if you can?

Answer. I live at Markham station, this county; before moving to my present place of residence last year, I had lived in Paris for upwards of twenty years; from the 1st of January, 1865, to Sept. 1872, I resided about half way between Paris and Markham. I am a physician. I have also been engaged in farming; I do know these farms. I rented some land just after the war, and the man renting agreed to give me a dollar and a half per acre, which is as much as any one can afford to give for land if farmed with proper restrictions. If one is allowed to cultivate as much corn as he wanted, he could afford to give more.

2nd question by same. In estimating the rent at a dollar and half per acre, are you supposing that the tenant grazes as well as cultivates the crops?

Answer. I suppose he has the privilege of grazing, and farms under certain restrictions—not killing the land—being compelled to sow grass-seed.

3d question by same. Is not capital necessary in the business of grazing; and what has been the condition of capital in this country since 1865, to the present time?

Answer. It is; money has been very scaree, comatable only to a few, and at ruinous rates at that.

3d question by same. What is the present condition of Bollingbrooke, in comparison to what it was in 1865; has it enhanced in value?
65 (Question excepted to by Jas. V. Brooke. atty., &c.)

Answer. I think it has enhanced in value since 1865, decidedly so. As to the amount of the enhancement, I think, Mr. Loughborough's estimate a very moderate one.

4th question by same. Do you know anything of the relations between John Carr and Mr. Bolling, whether they are friendly or unfriendly?

Answer. By common report they are unfriendly.

(Answer excepted to by Jas. V. Brooke, atty.)

1st x-question by pltff., by counsel. What farm did you rent for $1.50 per acre? Describe it as to location, number of acres in the tract, quantity of arable land, how much in sod, how much in wood, and also how the said land will compare in value, according to assessment or in the market, with Bollingbrooke.

Answer. The lower half of Granville farm, owned by the late Daniel Payne, near Warrenton; there was four hundred acres in the tract, about 290 acres arable; at the time I rented it there was very little in sod; it was in very good grass. I have no means of knowing how said land would compare with the assessed value of Bollingbrooke. I would put it as better land than Ben Lomond, and not so good as Bollingbrooke; there were two hundred acres of the farm in very good grass.

2 x-question by same. You say there are 290 acres of arable land and about two hundred of this in grass. What restriction did you put upon the tenant as to the cultivation of the grass land?

Answer. He was to put fifty acres in corn, and the same quantity in wheat, and was to sow grass-seed and plaster; I did not restrict him in the grazing.

3d x-question by same. In what do you consider the increase in the value of the Bollingbrooke and Ben Lomond farms to consist; and would the lands sell for more now than in May, 1866, according to your judgment?

Answer. I was in the habit of riding through Ben Lomond and Bollingbrooke, when practicing medicine in that neighborhood, and I have noticed that there is a good deal more and better grass than there was, and the fencing is better. A good deal of plank fencing has been put upon Ben Lomond.

4 x-question by same. Would these lands sell for more than they would have in 1866?

Answer. They are intrinsically worth more, but whether they would sell for more you know, or could answer the question as well as I; but for farming or grazing purposes they are worth more than they were then.

5 x-question by same. From your knowledge of the rental value of lands in that neighborhood, would not Bollingbrooke and Ben Lomond have been rentable since *the* May, 1866, to a judicious tenant, and upon proper terms of cultivation, at a joint rent exceeding two thousand dollars?

66 Answer. Not without loss to the renter, in my opinion; or, in other words, a dollar and a half per acre is, in my opinion, a big money rent for the best of lands.

6th x-question by same. My enquiry is not as to your own opinion, but whether you do not think others would have been found willing to pay a rent for the two farms exceeding two thousand dollars, even though the transaction might not have proved a profitable one to the tenant.

Answer. Fools have always existed, and probably they might be found at this time.

7th question by same. The rent of Bollingbrooke and Ben Lomond at your estimate, a dollar and a half an acre, being $1,665, are you prepared to say that no one would probably have been found ready to give an increase over your estimate of $335.00 without subjecting himself to the charge of folly in making such contract.

Answer. I mean to say so, without he was willing to lose.

And further deponent saith not.

ALBAN S. PAYNE.

Deposition of Hugh Rogers, taken at same time.

1st question by Wm. H. Payne, atty. for defendant. Please state where you live; what is your pursuit. Do you know Bollingbrooke and Ben Lomond; how long have you known them: what would be a fair annual money rent for each from the 2d of May, 1866, to the 2d of May, 1873, distinguishing each year, if you can?

Answer. I live in Loudoun County, near Upperville in this county; my pursuit is that of a farmer, and have been engaged in the same since 1851. I am well acquainted with these two farms, and have known them ever since 1861; that is pretty hard to say what would be a fair annual rental for these farms. I cannot answer that part of the question.

2d question by same. What is the condition of the farms now as compared with what they were in 1866?

Answer. Very much improved.

3d question by same. What would you estimate the enhanced value per acre?

Answer. I would not put it less than ten dollars per acre; I allude to Bollingbrooke.

4th question by same. Is there any difference in the value of Bollingbrooke and Ben Lomond. State what difference you would make in renting said farms; I mean as per acre.

Answer. There is a difference in the value of these farms. I would not be able to say what the actual difference is; can't say.

5th question by same. Do you know the state of John Carr and Joseph Gibson's feelings in regard to Mr. Bolling, and have heard either express any wishes in connection with this controversy?

67 Answer. I do not think Mr. Carr is friendly with Mr. Bolling. I can't say as to Mr. Gibson. I heard Carr remark that $2,600 he considered a very moderate rent.

6th question by same. Did you ever hear Mr. Gibson express the wish that Mr. Lersner should succeed in this suit?

Answer. I don't know that I could prove the fact; if I did it has been some time ago.

7th question by same. Do you know anything of the suit of Carr v. Carter, in which it was charged that Carr and Gibson were allies in a meditated fraud?

Answer. I do not.

Cross-examined by Jas. V. Brooke, atty. for compl't:

1st x-question by same. Do you know of the renting of any lands in the neighborhood of these farms, or in the upper end of this county, since the war? If aye, specify any that you know to have been rented for money rent.

Answer. I do not.

2d x-question by same. Do you know of the renting of any lands for grazing purposes since the war? If aye, state what you know with regard to the price for which they have been rented.

Answer. I do not.

3d x-question by same. Please state in what particulars the improvement of the Bollingbrooke farm consists, and to what causes it is due.

Answer. During the war they had a number of hands there and compelled to cultivate the land principally in corn, and the land was left without grass and grass-seed. Since the expiration of the war they have been enabled to get grass-seed to sow on the land, which land that

was then cultivated is now in fine sod. There has also been a large amount of ditching, draining, and fencing since the war.

4th x-question by same. You say "they" had a number of hands, &c. Whom do you mean by "they?"

Answer. I mean Mr. Robert B. Bolling.

5th x-question by same. During what years prior to 1866 was the land cultivated in corn as you have stated?

Answer. During the war; I can't say what particular years of the war; some years probably less than others, probably more some years. The hands, I think, remained there to the end of the war.

6th x-question by same. Am I to understand that all the sod land had been ploughed up prior to 1866? If not, please state how much was in sod in 1866, and how much land it was necessary to cultivate annually for the consumption of the family, laborers, and live-stock on the farm?

Answer. All the sod land had not been ploughed up. I cannot tell exactly how much was in sod. All I know that at the end of the war several fields were necked for the want of grass-seed to seed
68 upon them. There seemed to be some three or four hundred acres in sod in 1866. There was not much live-stock on the farms during the war, as the Yankees cleared nearly all of it off. I do not know; there were more hands on the farm than was usually kept on farms, and I, being a small farmer, could not tell how much it took to supply them.

7th x-question by same. What allowance of corn will suffice for the maintenance of an establishment of any size? You may fix the number to suit your own experience or observation.

Answer. I never took any account of such things.

8th x-question by same. What allowance of meal per head has been the custom of farmers to make to laborers either during the time of slavery or since?

Answer. In my country they never allowanced them.

9th x-question by same. How much would they usually consume per head each day, week, or month?

Answer. I never took any account of it.

10th x-question by same. Can you give any idea?

Answer. I would not like to say, as I never weighed or measured any to the hands.

11th x-question by same. Can you form any idea how much corn you consume in supporting your farming establishment any one year?

Answer. I cannot.

12th x-question by same. Will you state, if you can, whether any, and, if any, what, part of these farms which was in sod on the 19th of January, 1863, was not in sod on the 2nd of May, 1866?

Answer. I can't say which fields were not in sod; I could not say as to these dates.

13th x-question by same. Do you know of Mr. Bolling's having ploughed up any of his sod land since the commencement of the war? If aye, please state what portion was so ploughed, and when.

Answer. I could not say; he has cultivated fields, but do not know of his having ploughed up any sod land.

14th x-question by same. Please state what portions of these farms are now in grass which were not in grass on the 19th January, 1863, and what portions are now in grass which were not in grass on the 2d of May, 1866.

Answer. The fields which were in cultivation during the war are now in good sod. Since the war he has been able to get grass-seed. I think it was in 1866 that the fields which were cultivated during the war were

put down in grass; I don't think he was able to get the seed before that.

15th x-question by same. Please state exactly the condition of these farms, describing them by fields, the first of the year 1863 and the 2d of May, 1866, stating which were in cultivation and which were in grass at each of these periods.

Answer. I do not think I am familiar enough to tell the exact fields at either time.

69 16th x-question by same. Which of the fields are in grass and which in cultivation this year?

Answer. The field next to the road leading from Upperville to John Carr's is in corn; the field adjoining that next to it, running up the mountain, was in wheat; the wheat was stacked or thrashed on it now.

47th x-question by same. You have said in answer to 6th x-question, "there was not much live-stock on the farm during the war, as the Yankees cleared nearly all of it off;" please designate what stock was so cleared off from these farms and what was so left.

Answer. I could not say at what period it was when the Yankee army came through that country; sheep, hogs, cattle, their hides being left on the fields. I do not know the number.

18th x-question by same. Do you know of your own knowledge that any stock was taken from these farms by Yankees? If so, please state how you know it and in what year it was done, and the number.

Answer. I was not present when it was taken, and am glad to say was not present. I knew from the signs that was left—hides; and I knew that Mr. Bolling had good stock, and I knew it from what was told me. I do not know the year. I do not know the number.

19th x-question by same. You have said you were not present, &c. Were you in this county at the period of these supposed depredations by the Yankees?

Answer. I passed through the farm after these depredations were made?

20th x-question by same. Can you state whether they were supposed to have occurred in 1861, '2, '3, '4 or '5.

Answer. It occurred during the war; I can't say the year. My memory is not very good as to dates.

21st x-question by same. Please state what stock Mr. Bolling had on these farms at the expiration of the war, specifying the kinds of stock.

Answer. I do not think he had more than a few government horses, or something like that; I do not recollect of any other stock.

22d x-question by same. Do you know what forces, and under whose command they were, which committed the depredations of which you have spoken?

Answer. I do not.

23d x-ques. by same. Who was occupying the houses on these farms and the farms themselves during the war and at the close of the war?

Answer. Mr. Bolling had pos'ession of these farms. He and his younger children were there—those not old enough to be in the army.

24th x-ques. by same. What are the improvements on Bollingbrooke as to kind and quality? Please describe them as well as

70 you can, and state how they compare with the improvements on farms generally in that section.

Ans. The dwelling is a large brick house; out-buildings are all good. The out-buildings are smoke house, kitchen, servants' houses, black-

smith shops, stables, barn, ice-house, &c. They compare very well with the majority of improvements on farms in that country.

25 x-ques. by same. Please state the condition of the barn of which you have spoken.

Ans. I think the barn is connected with other buildings—stabling, blacksmith-shop under the same roof; what is used as a barn now for grain, horses, &c., is under roof. I do not think that the center of the barn is under roof; the inside of that part of the barn which is not covered is unfinished and not used.

26 x-ques. by same. What, in your judgment, would such a farm as Bollingbrooke and Ben Lomond combined rent for per annum in money upon the usual restrictions to the tenant; what would the said farm rent for to be used for grazing exclusively, the tenant having the use of the improvements; what would be a fair rent for the grass-land per month?

Ans. I could not say what they would rent for. I do not know that any farms are rented for money-rent in our country; nor can I answer the 2d clause of the enquiry; some seasons the grass-land is worth more than others. Per head some months and some seasons it is worth as much as two dollars, and then at other times it may not be worth over a dollar.

27th x-question by same. Supposing the party wishing to rent all the grass-land on these two farms from the beginning of the grazing season to the end, what would be a fair rent under the circumstances, according to the custom in your country; is the most of the sod-land on Bollingbrooke old or new?

Ans. Some season the grass would worth from one dollar to two dollars per head per month; most of the sod is old.

Examination-in-chief resumed:

1st question by W. H. Payne, attorney. In this matter of grazing, if you rent land for one month at two dollars, is it not generally the case that you have to move your cattle the next month?

Ans. You have to move them or reduce the price after the first month.

And further deponent saith not.

HUGH ROGERS.

Deposition of Douglas Tyler, taken at same time.

71 1st question by W. H Payne, attorney for defendant. Please state where you live, what business you are engaged in, whether you are acquainted with the farms of Bollingbrooke and Ben Lomond. How long have you known them, and what would be a fair annual money-rent for each farm from the 2nd of May, 1866, to the 2nd of May, 1873, distinguishing each year if you can?

Ans. I live about four miles from Upperville and six from Bolling; brooke. I am farming. I am acquainted with Bollingbrooke, but have never been on Ben Lomond but twice, and that was during this summer-have known Bollingbrooke for three or four years. Not having known Bollingbrooke except for the last three or four years, can't speak of its rental prior to that time, and can't speak of Ben Lomond at all. The rent would depend upon the character of the land; but for the years that I have known it, say since 1869 or 1870, if it was farmed as Mr. Bolling has farmed it, I should think that a dollar and *and* half per

acre for the whole farm, or two dollars per acre for the open land, would be a fair annual rent.

2d ques. by same. Explain the method of renting land for grazing; how the prices run, and what controls them.

Ans. I do not think there is any general rule about renting land for grazing. It depends pretty much upon the necessities of the party wanting grass. I never rented but once myself. I rented grass at Bollingbrook this summer, the early part of the summer, and the grass was very good. I gave two dollars a month for it then, but would not give one dollar for the same grass now. I mean two per month per head. I and others had about a hundred head of cattle on a field of about three hundred acres; that is about three acres to the head. There were several fields, but the inside fences were down in places, so the cattle had the run of the fields. I contracted for two months, but took them away after the first month, because I considered my own grass better.

3d question by same. What would be the effect upon the intrinsic value of the land of a system of farming that would enable a tenant to pay an annual money rental of $2,000.00 for Bollingbrooke from May, 1866, to the present time? I mean to enable a tenant to pay a rental of $2,000.00 a year. What would have been the condition of the land at the end of six years?

Answer. I think it would be detrimental to the land in this: that, in order for a tenant to make $2,000.00 a year, he would have to break up more sod-land, for I do not think he would make it at grazing; and as in proportion that sod-land is more valuable than other land, so would the farm have been damaged.

Cross-questioned by R. T. Scott, atty. for complainant:

1 x-question. How long have you been engaged in farming; and are you experienced in the matter of renting land either for money-rent or rent in kind?

72 Answer. I have been farming three years. No, I cannot say that I am experienced in renting land either way; no practical experience of my own; only rented a farm out in Loudoun once.

2d question by same. Is the rate of two dollars per acre per year for good land in your neighborhood—I mean in the neighborhood of Upperville—unusual renting?

Answer. I have not known of any leases made in that way. They generally rent for so much in gross, which would be so much per acre or so much of the crops.

3d x-question by same. How much of the crop is given usually?

Answer. That depends upon the character of the land. For good land they generally get half of the crop, and the tenant furnishes grass-seed and fertilizer in proportion of half, and delivers the crop. For more indifferent lands it is generally about two-fifths. ($\frac{2}{5}$.) I have not known it in my neighborhood to be less than that.

4 x-question by same. Do you think two thousand dollars ($2,000.00) a year as rent for Bollingbrooke, where the party in possession was unrestricted as to cultivation and grazing during the period you have known the farm, high or unreasonable?

Answer. No, I do not. I will give two thousand dollars for it to-morrow, with an unrestricted lease.

Examination-in-chief resumed:

1st question by W. H. Payne, atty. Would you make such a lease as

you have just spoken of were you the owner of Bollingbrooke; and what would be the effect upon the intrinsic value of the land?

Answer. I would not make such a lease. It would depend altogether as to the effect upon the intrinsic value of the land upon the amount of sod-land that the tenant ploughed up; and the tenant could plough up enough of sod-land as it now stands to make the injury to the land as great as the lease. I understand by an unrestricted lease such a lease as would enable the tenant to make out of the land all he could.

2d question by same. Would not a landlord be better off who had received a thousand dollars rent per annum, and got his land back in the condition that Mr. Bolling now has it, than to have rented out for the past seven years to a tenant who was to pay $2,000.00 a year, and to be allowed to so manage the land as to be enable' to pay that sum?

Answer. I would rather have the thousand dollars if I were the landlord, and the land back in its present condition.

Cross-questioned by same:

1 x question by R. T. Scott, atty for complt. As you have speculated upon matters embraced in defendant's 2d question, I will
73 ask if you had been entitled to the possession of Bollingbrooke on the 2d of May, 1866, and it had been detained from you from that period and up to the present time, do you think (its present condition considered) two thousand dollars a year an exorbitant or unreasonable rent to be demanded during this time?

(Question excepted to by W. H. Payne, atty. for defendant, because the opportunity to cross-examine upon this point has already been allowed him, and they failed to avail themselves of it; they cannot now ask the question.)

Answer. I do not know exactly how to answer it, for I have not known the land except for the last three or four years. When I speak of the value of the land in any answer I have given, I refer to the period in which I have known the land.

And further deponent saith not.

DOUGLAS TYLER.

The attorn*ies* for the complainant, Gustavus Lersner, except to the 2d and 3d questions and answers in the direct examination of Hugh Rogers as irrelevant, not responsive to or bearing upon the issue to be passed upon by the com'r, and for other reasons. They also except to the 5, 6, and 7th questions for the same reasons, and also to the 1st question on the direct examination resumed; they except also to the 2d question and answer on the direct examination, and to the 1st and 2d questions in the examination-in-chief resumed of Douglas Tyler.

It was understood and agreed that these exceptions could be taken to the questions and answers after the depositions were closed, and are therefore here noted.

COMMISSIONER'S OFFICE, WARRENTON, VA.,
20 *August*, 1873.

The foregoing depositions were regularly taken, sworn to, and subscribed to in accordance with the caption thereof.

Given under my hand as com'r of ch'y of the circuit court of Fauq. c'ty, this 20 Aug. 1873.

H. SHEPHERD.

Deposition of Thomas N. Latham, October, 18, 1873.

1st question by W. H. Payne, atty. Please state where you reside and whether or not you are acquainted with the farms known as Bollingbrooke and Ben Lomond, owned by Robt. B. Bolling, being in the upper end of this county; and if acquainted with them, state how long you have known them.

Answer. I reside in Upperville, of this county. I know both of the farms well, and have known them upwards of thirty years. I sold the Ben Lomond farm as a com'r of the circuit court of this
74 county, in the chancery suit under the style of Armistead vs. Armistead's admor. and was on the survey of the same.

2d question by same. Please state what was the condition of this county in the year' 1865, and 1866, and 1867. I mean with reference to farming utensils, stock, and capital.

Answer. The fences of almost every farm were thrown down and destroyed during the war, and nearly all the farming utensils and stock, such as horses and cattle, were almost entirely destroyed; there was no money or capital in the country at the end of the war, except southern bank money, which was worth very little. I think I sold some of the bank money I had for twenty-five cents *in* the dollar, and for some I could not get that.

3d question by same. Are the lands in your neighborhood, especially those of Bollingbrooke and Ben Lomond, affected in their annual value by the opportunities of grazing them? What I mean is, would they rent higher with the opportunity of grazing them than they would without the privilege of grazing them?

Answer. They would rent higher, much higher; ours is a grazing country, and we could not get along without grazing; to rely upon wheat and corn is a very poor business.

4th question by same. Will you state from all the facts in your knowledge what, in your opinion, would be a fair rental per acre for Bollingbrooke and Ben Lomond for *the* each year, possession delivered in the month of May, 1866, to May, 1873? Distinguish each year as well as you can.

Answer. I would say from May 1866, to May, 1867, a dollar and seventy-five cents ($1.75) per acre for the cleared land of Bollingbrooke, would be a fair rental for that year, and a dollar and twenty-five cents ($1.25) per acre for the same time would be a fair rental for Ben Lomond. I know this land well. It is mountainous land, and a great deal of it is very poor; and from May, 1867, to May, 1873, for Bollingbrooke, for the cleared land—I exclude the woodland entirely—two dollars ($2.00) per acre per year would be a fair rental, and for Ben Lomond for the same time, one dollar and twenty-five cents for the clear land per acre, for the year, would be a fair rental. I would not give a cent more, and I believe the man who would give more would lose by it. There is nearly a hundred acres, if not quite, of woodland upon Bollingbrooke, and about forty acres of woodland upon Ben Lomond.

5th question by same. Please state what is the present condition of these two farms; in what manner have they been managed by Mr. Bolling, whether to improve or injure the land.

Answer. Nearly all of both of these farms is in grass and have been cultivated very little, either of them, up to the present time. Since the war the management of these farms has been to improve the land.

6th quest. by same. Will you state what is the difference in the intrinsic value of the land managed as Mr. Bolling has managed

75 it, and what it would have been, rented so as to have enabled the tenant to have paid the rents you have put upon it, so as to have made something out of the land?

Answer. I should make a difference of from ten to twelve dollars per acre.

7th question by same. In your estimate of the rent of this land, did you suppose the tenant to have capital enough to graze?

Answer. It was.

And further deponent saith not.

THOS. N. LATHAM.

Deposition of Townsen S. Bolling, taken November 10th, 1873.

1st question by Wm. H. Payne, att'y for complainant. Do you know the Bollingbrooke and Ben Lomond farms? If so, state when you were there, what was your connection with them, and what was their condition in 1865 and 1866.

Answer. I do know them; I was there in the capacity as agent for my father from June, 1865, to September, 1870; when I first went there in June, 1865, the fencing was all down, the ditches filled up, a good many of the fields covered with brush and briers, and had the appearance of a farm that had been very much neglected. In speaking of the fencing as down, I mean that there were gaps throughout all the stone fencing, and the rail fencing was almost altogether down, and wagon-roads through a great deal of the gaps in the fencing. This part of the answer applies equally to both farms.

2d question by same. Did you keep an account of the farming operations? and, if so, state the result in detail for each year, beginning with 1865.

Answer. I did not keep an account of the crops pitched, such as corn planted or grain sown; have entries of seed-wheat purchased during some of these years.

3d question by same. Can you state the average in crops per year for period referred to?

Answer. I think we aimed to seed fifty to sixty acres in wheat; and one year, if not two, no wheat was seeded at all. I do not remember how much corn was planted, but suppose some forty to sixty acres of land was planted; a great deal of the wheat was seeded in corn-land.

4th question by same. Have you any record of the farming operations during the period you acted as agent for your father; and, if so, can you furnish them to the commissioner?

Answer. Yes, sir; accounts of seed-wheat purchased, and wheat sold, and corn purchased, &c. (The witness here exhibited certain papers, and they were folded and marked "1B with T. S. Bolling's deposition.")

5th question by same. Do those accounts represent the true and accurate state of the farming operations on said farms during the
76 period you were acting as agent of your father?

Answer. As far as my knowledge extends.

6th question by same. I see for the year 1866 considerable sums from the sale of bacon; will you explain them?

Answer. The sale of this bacon, or at least the largest part of it, was owing to the fact that we had laid in the usual supply for the negroes then on the farm; they left in January, 1866, and the same was sold.

7th question by same. What do you mean by laid in, (I refer to the bacon,) raised upon the farm, or purchased by your father?

Answer. The most of it was purchased.

8th question by same. I see an entry of 200 bushels of wheat sold in the fall of 1866; can you state what you got for it, and to whom it was sold?

Answer. I have no recollection of what we got for it or to whom sold; I know wheat was very high.

9th question by same. I see an entry of 27 Government cattle, bought in Nov. 1865; please state what became of them.

Answer. They were bought in the fall of 1865, in Petersburg; they were driven up here by the way of Fredericksburg, and being in very low order, and having difficulty in procuring feed on the rout', seven (7) of them, within a week or ten days, died; the balance were fed on corn, fattened, and sold during the years 1866 and 1867; some of them may have been kept over to 1868; I know they were on hand a long time.

10th question by same. What is the present condition of the farms, compared with what they were in 1865 and 1866?

Answer. The condition is far better; the fences are in good repair; the ditches are generally open, the grass very luxuriant.

11th question by same. I see no mention in your account for iron for horse-shoes, ploughs, repairs, &c., was any purchased. If so, state how much and the value, as near as you can.

Answer. Some was purchased, and coal also, during that period, and up to January, 1873. My father having a blacksmith of his own, hiring one, I could not state the exact value of these articles purchased, but it must have been considerable.

Under agreement to that effect, pl't'ff, by counsel, now excepts to foregoing questions and answers upon the ground that the true standard of defendant's accountability for rents is not the amount actually realized by him, but the amount which might have been realized under a fair and proper system of renting; and he also excepts to the account filed marked as inadmissible as testimony. And not waiving these exceptions, he proceeds to cross-examine, as follows:

1 x-question by James V. Brooke, att'y for compl't. When you went to the farm, in June, 1865, as you have stated, who was in possession of Bollingbrook' and Ben Lomond, and who had been in possession during the war?

77 Answer. My father.

2d x-question by same. Had you been in the habit of visiting the homestead (Bollingbrooke) previous to 1865, this time; if so, to what extent?

Answer. I was there once during the period between January, 1860, and June, 1865; it was during the war, I think; am not positive as to the year. Previous to 1860 I had lived on the farm for about eighteen months.

3d x-question by same. Was the household and kitchen furniture belonging to Bollingbrooke in the same condition as theretofore when you visited it in June, 1865?

Answer. I think it was; though I do not remember having observed it particularly.

4th x-question by same. What stock, including under that term horses, mules, oxen, cattle, cows, sheep, and hogs, and what farming implements were on these farms in June, 1865?

Answer. There was a lot of Government horses there, lame horses purchased by my father, captured by my brothers and taken upon the farms, and one old and blind mule which was on the farm previous to 1860; there were four oxen, seven or more cows, some of them old, crippled, and blind. I do not remember any hogs, and there were a few wild

and crippled sheep, five or six. I remember the farming implements were very much out of repair, and not many of them; there was a threshing-machine, a few old broken-down wagons; there were some plows, old and out of repair.

5th x-question by same. How long had the threshing-machine been on the place? And state whether it is now on the farm.

Answer. I do not know how long it has been on the place, but a long time; it is still there and in good order.

6th x-question by same. What is the market value of such machine?

Answer. I have no idea; it is an old machine, built in 1859.

7 x-question by same. Do you know of any disposition made by your father of any stock of the character mentioned, or of their removal from the said farms by him, between the time of his contract with Lersner, 1863, and until June, 1865?

Answer. I do not.

8th x-question by same. In what form, if any, was the account kept from which the paper marked "1B, with T. S. Bolling's deposition," has been compiled?

Answer. The account was kept in a book, and the account as here presented is a copy from said book.

9 x-question by same. By whom were the entries in said book made?

Answer. I made the entries in the book, but there are some entries in the accounts presented here that I took from amounts paid and received by my father, which were not in the book.

78 10 x-question by same. Do I understand you that you are able to state, of your own knowledge, a full account of the receipts and expenditures during the time embraced in said paper?

Answer. No, sir; there may have been some entries omitted on both debit and credit side.

11th x-question by same. Did you remain continually there during the time you have mentioned; if not, to what extent were you absent?

Answer. No, sir; I was away frequently during that time. I remember twice during that time of being away on short visits.

12th x-question by same. You speak of the condition of the fencing in 1865; state, if you can, what number of rails were required to re-instate the rail-fencing and where they were procured.

Answer. I do not remember the number; but I know that several thousand of them were required to renew the fencing and were gotten out on the farms.

13th x-question by same. Were not 117 head of cattle bought of Guggenheimer on the 7th of November, 1865, and 27 head of Government cattle bought in Petersburg in October, 1865, by your father? If aye, where were they grazed in the fall of 1865, and thereafter?

Answer. They were; they were grazed on the two farms, Bollingbrooke and Ben Lomond.

14th x-question by same. Can you give an account and full statement of expenditures and receipts upon and from these farms during the period you have named, or one approximating accuracy, from your own knowledge of the transactions connected with them?

Answer. I think the state of the accounts as filed here approximates the receipts and expenditures during the period mentioned.

15th x-question by same. Do you not *from* this judgment alone from the account, so far as you kept it, supplemented by the other entries of which you have spoken in your answer to x-question?

Answer. Yes, sir.

Examination-in-chief resumed:

1st question by W. H. Payne, atty., &c. Do you not know all the cattle that were purchased and the disposition made of them; all the crops that were pitched and made; is there any matter connected with the farming operations during the five years that you are ignorant of or have failed to give an account of?

Answer. I do not know of all the cattle purchased and disposition made of them, and I do not know the exact amount of wheat sown or corn planted; there may possibly be some things connected with the farming that I may be ignorant of or may have fail' to give an account.

79 2d question by same. Does your ignorance apply to things made upon or sold from the farm?

Answer. It applies more particularly to the things raised upon the farm.

3d question by same. Could there be any matter of any importance not accounted in the account you have furnished?

(Question especially excepted as leading and illegal, by J. V. Brooke, atty., &c.)

Answer. No, sir.

4th question by same. In your account I see credits for home-raised cattle; is there any charges for them?

Answer. No, sir.

5th question by same. Did you stay at home as closely during these five years as it is the custom of farmers to do?

Answer. Yes, sir; and I think more closely than most farmers do.

(Plaintiff's counsel renews his former exceptions to above interrogatories and answers so far as they are connected with paper marked .)

1. Re-cross question. Who made the sales and collections of cattle sold?

Answer. I generally made the sales, and sometimes they were sold by commission, and my father also sometimes sold; I made some and my father the other collections.

(The plaintiff, by counsel, insists that if paper marked "1 B," is to be used for any purpose, the items in it should be separated so as to show the account kept by witness as distinguished from entries made otherwise.)

Examination-in-chief resumed:

1st question by W. H. Payne. Were you present at the sales made by your father; and is your personal knowledge such as to enable you to state that the account you have rendered is correct?

Ans. Yes, sir; I think so.

(Question excepted to by J. V. Brooke, atty., &c.)

And further deponent saith not.

T. S. BOLLING.

Paper "1 B, with Townsen S. Bolling's deposition."

1866.	1866.	Dr.	Cr.
Mch.	To cash pd. Littleton, 4 bu. clover-seed, per rect	$29 20	
May 16.	By Frazier's sale of 20 cattle, per acct. sales		1,551 49
Sep. 7.	To cutting rails, extra hands	27 00	
	To Waddell for seed-wheat, per rect., 40 bu. 40	101 67	

80		By bacon sold John Travis		11 65
	29.	To London, of N. Y., 8 bus. seed, pr. rect	40 00	
Oct.		By bacon sold Osborne		1 50
Oct.	6.	To A. P. Phillips, 18 bus. seed-wheat, per rect	49 50	
Nov.	19.	By sales bacon by Hove & Wedderburn, acct. sales		153 75
	20.	By sales bacon by Sedwick & Shepherd, acct. sales		190 98
	26.	By sales 34 cattle by Frazier, acct. sales		2,219 69
	30.	By sales 26 cattle by Frazier, acct. sales		1,794 58
		By sales of wheat, bus		
		To taxes on real estate	108 75	
		To wages	912 00	
		To seed-wheat		
July	10.	To James, agt., 5 sacks salt, per rect	16 25	

1865.		1865.	Dr.	Cr.
Apl.	14.	To 22 sheep @ $7 per head, of Geo. Grigg, per rect	154 00	
	17.	To 1 cow of Geo. Dayson, per rect, paid in wheat	40 00	
June	16.	To 1 pr. mules, Naylor & Bro., per rect	300 00	
Oct.	7.	To 100 bu. seed-wheat of Littleton, @ $2.25, per rect	225 00	
		To 920 lbs. bacon of Thos. R. Smith, per rect		
		To 286 lbs. bacon, of 1206 lbs., @ 25 c	301 50	
	10.	To 193 lbs. of Geo. Grayson, per rect	57 00	
	20.	To 27 Gov. cattle, bo't in Petersburg, as per rec'pts 1,322 50		
		To expenses of driving from Petersburg to Fauquier @ $3.50 94 50		
			1,417 00	
Nov.	7.	To 117 cattle, @ $50.00, of Guggenheimer	5,850 00	
		To expenses of weighing above, per recpt	5 85	
Dec.	29.	To 4 cattle, of Gill Terr, 2,950 lbs., @ 5c.	147 50	
81		To lbs. pork, purchased @		
		To taxes, (State)	129 59	
Nov.	11.	To direct Federal tax on land, on 769 acres, Bollingbrooke, $134 96 on 249 acres, Ben Lomond near Gap Run 25 54	160 50	

1867.		1867.	Dr.	Cr.
Jan'y	1.	To cash paid for pump and placing	5 55	
	14.	To " " Wines, starch, hay, per rect	10 00	
	26.	By Bastable's sale, 41 cattle, acct. sales		3,770 92
	31.	To 20⅓ bbls. corn of Wines, (rect.)	61 00	
Feb.	1.	To Blakemore, for driving cattle, rect.	20 00	

		To Strother for hay, pr. rect	22 50	
		To Waddell " " pr. rect	11 00	
	2.	To Stover for sack salt, per rect	4 25	
	4.	To Fradens, driving cattle, per rect	4 10	
Apl.		To Gemeney for herring, per ret	27 65	
	27.	To Rector, 16 cwt. hay	14 50	
April		To cash, 1 bus. salt for cattle	1 50	
May	30.	To Strother for hay, per receipt	15 00	
June	5.	To Seaton, for fodder	3 20	
July	18.	To Brewis, 4 sacks salt, per receipt	10 25	
Octo.	26.	To Richards, w'gh'g 50 cattle	4 00	
		By Hooe & W., sales of 57.55 bus. wheat acct. sales		137 17
Nov.	2.	To Byars, for 50 cattle	2,301 75	
	7.	By Hooe & W., sales of 101.05 bus. wheat, acct. sales		229 92
		By Frazier's sale 38 cattle		1,582 32
	13.	To Wm. Gray for cattle, $213 ent'd, $1,600 ch'k	1,813 00	
		To N. Loughborough, for corn, per receipt	32 50	
		To wages	912 95	
		To taxes	210 09	
1868.		1868.	Dr.	Cr.
Feb.	15.	By Adams, sales of white heifer and cow		$197 40
Mch.	3.	To N. Loughboro', for fodder and straw	31.50	
	17.	To Hooe & W., clover-seed, per rect	75 60	
82	Apl. 4.	By Saffel, for hides		17 12
	6.	To cash for 12 shotes	48 00	
May	18.	To 1 bbl. fish, Hooe & W., per rect	7 25	
	27.	To bill for salt, " " " "	19 75	
July	7.	To Higgins & Powers, fixing pipes, per rect	48 15	
	9.	By Adams, sales on acct. cattle, 20 h'd		100 00
Aug.	19.	" " " " " "		60 00
		" " " " " " "		960 00
	20.	" " " 32 cattle, acct. sales		2,201 33
Sept.	12.	To Hooe & W. for salt, per rect	12 75	
	25.	By 1 mule, Julia, to C. W. Adams		10 00
Octo.	13.	To Blakemore, driving cattle	60 00	
	24.	To " wages and expenses	27 00	
		To Travers, driving cattle	7 00	
		By Bastable's sales of cattle, 45, acct. sales		3,031 70
	27.	To Wm. Gray, 119 cattle @ $44, per rec't	5,250 00	
		To Wm. Gray, 45 cattle @ $47.50, per rec't	2,137 50	
	29.	To fixing pump	5 00	
Nov.	23.	To toll on cattle	1 00	
Dec.	4.	To Wood, for 10 shotes, per rect	40 00	
	12.	To Hooe & W. for salt, per rect	12 75	
		To Mrs. Edmonds for 3 cattle, per rect	112 50	
	25.	To Davis for corn and straw, per rect.	106 00	
		To this amt. pd. for ditching	236 80	

	To " " " " stone fencing	93 25		
	To wages	902 00		
	To taxes	209 99		
1869.	1869.	Dr.		Cr.
Jan'y	To McCarthy for 12 shotes	$27 00		
Feb'y	8. To Lem'l Fletcher on acct. feeding 75 cattle on corn, as per D. S. F.'s receipt	600 00		
	To 9 bus. meal	9 00		
	18. To Harper for 6 shotes, per rect	15 00		
	25. To 9 bus. meal	10 00		
Mch.	4. To A. Glasscock for 8 shotes	32 00		
	5. To cash for 74 bus. oats	40 70		
	8. To Hoge for straw	30 00		
	16. To cash for cleaning wheat	4 00		
	19. By cash for hides to Kimble			10 00
	22. To L'l Fletcher, 5 bbls. corn	20 00		
	27. To Miss Shacklett, 10 bbls. corn	40 00		
	To Wm. Fletcher, 30 bus. oats	21 00		
83	To 38 bus. oats @ 62½, per rect	21 75		
	28. To 37½ bbls. corn of Jeffries	150 00		
	29. To 50 bbls. corn of C. B. Hite	200 00		
	31. To Hooe & W. for clover and timothy seed, rec't	34 75		
Apl.	3. To Stewart, 138 shocks fodder	34 50		
	6. To Irish for 6 bbls. corn	24 00		
	7. To Haines, 23 bbls. corn	86 25		
	9. To Luckett, for fodder and 1 trace	162 67		
	By S. M. B.'s sales of lambs and mutton			141 65
	By Fin's sales of heifers and sheep			508 48
	12. To P. Hartman for hay	30 00		
	To Hooe & W. for plaster	11 00		
	To " " " " 1 bbl. fish	8 00		
	21. To Loughborough, 5 bbls. corn	20 00		
May	2. By cash, Mount, on acct. cattle			500 00
	17. To Herbert, 7½ bus. corn	7 50		
	18. To Hooe & W., bill for salt, per rect	30 75		
	21. To F. M. Fletcher, on acct. corn	100 00		
	31. By Mount, on acct. cattle			1,500 00
June	1. To L. Fletcher, for feeding corn to hogs	9 75		
	3. To F. M. Fletcher, corn, in full	114 00		
	4. By cash of M. & Carter for 3 cattle			239 52
	7. To 2 bbls. lime	4 00		
	12. To Holmes, repairing gutters	21 10		
	19. By cash of Mount, for cattle			1,200 00
	To Ward, for 1 bbl. lime, per rect	2 00		
	29. By cash of Mount, 18 cattle			1,464 75
July	7. By wool to Wheat & Anderson			15 00
	14. To Higgins, plumbing, per rect	15 70		
	25. To cash for meal, per rect	9 00		
July	27. By cash of Mount for cattle			383 50
"	27. To 2 bbls. meal	9 00		
Aug.	18. By cash 29 lbs. bacon, 17½			5 00
	To 10 bu. meal, per rect	9 00		

	21.	By 73 lbs. bacon		12 80
	26.	" 34 " "		6 00
	28.	To 10 bu. meal, per rect	9 00	
Sep.	2.	By 19 cattle sold in Balto		1,154 25
	11.	To 2 bbls. meal, per rect	9 00	
	16.	To 149 lbs. flour, Ward, per rect	7 45	
Oct.	18.	By cash of Mount for cattle		200 00
	25.	To cash 10 shotes, @ $4 $40		
		" 2 " $3 50 7		
			47 00	
84	Nov. 3.	To Newlon for flour, per rect	3 20	
	13.	To 141 rods ditching, @ 50c	70 50	
	29.	By cash of G. Fin on acct. of 75 cattle		1,000 00
Dec.	1.	By cash of Ayres for 16 cattle		1,120 00
	4.	To 4 sacks salt, H. & W., per rect	9 85	
	9.	To 1 bbl. flour, Conrad, per rect	9 00	
	27.	To Heniger for 22 cattle	1,001 00	
		To ditching, open and blind	399 50	
		To fencing	15 75	
		To taxes	219 52	
		To wages	1,291 91	

1870.		1870.	Dr.	Cr.
Jan'y	7.	To Sweeney, 130 bus. oats	58 50	
		To Brown for making two gates	4 00	
Feb'y		To Moss for sawing lumber	5 75	
	15.	To Heniger on acc't cattle	1,000 75	
		To gates of Brown	9 25	
	17.	To 1 bbl. flour	9 00	
Mch.	16.	To Copenhaven on ac. cattle 300 00		
		329 27		
			629 27	
Apl.	19.	To 4 bu. clover seed	35 00	
June	9.	By 150 bu. corn, sold by Lawson		144 79
	17.	By sales of 9 cattle, H. & M.		618 83
	21.	By sales of 179½ lbs. wool, @ 30c		53 85
	24.	By 14 cattle—two home-raised, sold by Harrison		1,480 38
July	3.	By cash of Marshall on ac. cattle		100 00
Octo.	20.	By 22 cattle sold in Balto		1,617 00
Decr	5.	To Heniger for 70 cattle	3,334 50	
		By sales of corn by Lawson		144 83
Octo.		" " 29 cattle		1,827 00
		By hides sold Ward		12 00
Decr.	15.	To corn of Mrs. Williams	226 30	
		To ditching 137 00		
		To board of ditchers 150 00		
			287 00	
		To wages	1,246 00	
		To taxes	363 60	

1871.		1871.	Dr.	Cr.
Feb.	10.	By cash for cattle sold by Harrison		350 57
		By sales of wheat by Lawson		30 13
Mch.	14.	To 30 bu. seed-oats	15 00	
	15.	To 3 bbls. flour of Newlon	25 00	
April	1.	By hides, &c., sold Delaplane		19 00

		By cash, 109 bu. oats @ 47		51 23
85 May	1.	By 5 home-raised heifers sold Harrison		240 00
		By 1 steer, Bright		100 00
	20.	By 100 lbs. wool to Richardson		30 00
June	17.	By 7 cattle sold in Geo'town		281 32
Octo.	9.	By 18 " " Balto		869 67
	17.	By cash of Delaplane for bacon		38 00
	26.	" 15 cattle sold in Balto		754 55
Dec'r	4.	To 25 cattle of Heniger, $31.11	777 75	
	7.	To clover & timothy, H. & Hairston	120 90	
	26.	To 20 shoates of Alden, $7.44	148 80	
		To 130 rods stone fencing	130 00	
		To taxes	328 00	
		To wages	1,270 00	
1872.		1872	DR.	CR.
Jan.	17.	To 8 hogs of J. L. Adams	40 50	
Feb'y	5.	To 8 shoates of J. L. Adams	31 50	
	26.	To 250 feet plank	5 18	
		To 1 ram of Buckner	10 00	
Mch.	14.	To Gray for 42 cattle	1,365 00	
		By hides &c., to Lawson		10 00
	18.	To rick straw, Tayloe	12 00	
	20.	To Ric'd Wallace, cleaning well	5 00	
	23.	To weighing 30 cattle	1 20	
April	2.	To 8 bus. oats of Delaplane	5 20	
	10.	To Hooe & W.'s bill for salt	15 11	
	11.	To John Gray, 15 cattle	540 00	
	16.	By cash for 6 hogs to Harrison		41 50
	19.	By cash for heifer to Harrison		57 55
		By cash for Devon cow		27 50
	22.	To cash 15 bbls. corn	45 00	
	26.	To 3 bbls. flour { 2= 18 / 1= 10 }	28 00	
May	10.	To weighing 5 cattle	25	
		To 4 bu. oats	2 00	
		By cash, 5 bullocks and 1 bull		583 40
May		By Hooe & J.'s bill for peas, fallow	8 75	
	16.	To hair, &c., for plastering	1 00	
June		To Jackson for blinds, sash, &c	27 50	
		To Delaplane's bill for plaster	53 40	
	6.	By 111½ lbs. wool @ 45		50 00
	7.	To whitewashing and plastering	22 00	
	7.	To toll on 8 cattle	14	
	12.	To toll on plaster	3 54	
86	13.	By cash, ten cattle sold in Baltimore		548 92
	15.	To f'r'gt on lumber	2 20	
July	12.	To 1¼ tons plaster, Delaplane	11 25	
	31.	To bill of lumber, Hooe & J't'n	22 99	
	3.	To Dunnett for plumbing, pump, &c	256 81	
Aug.	3.	By cash, Harrison, for 4 heifers		200 00
	6.	By Lausen's sale of wheat		439 06
	7.	By 654 pounds of bacon @ 9 cts. Delaplane		58 86
	9.	By 146 bushels wheat, by Lausen		202 13
	12.	By 11 cattle, 11,340 @ 5 c		567 00

	31. By cash for 7 tails to Adams			231 00
	31. By cash for 1 (Ward) bullock			50 75
Sept'r	9. By cash for 13 cattle to Adams			689 00
	20. To bills for flour, $2; oats, $2; and meal, $1.80		5 80	
	30. To 4 bushels meal and expenses of Hooe & J't'n		4 05	
Oct'er	1. To Delaplane's bills for flour, $4.14, $3.00		7 14	
	9. To 40 lbs. flour of Delaplane		2 00	
	19. By 13 bullocks to Adams			666 25
	28. By 4 " " $55			220 00
Dec'r	9. By 2 " " $45			90 00
	11. By 2 hogs to Gibson			29 50
	14. By 4 cattle to Adams			140 00
	14. By 10 hogs to Adams			139 00
	20. By 12 shotes to Rector			50 00
	31. To Harper 350 shocks fodder, 30		102 00	
	31. To Hite for 1 rick straw		13 00	
	To taxes		289 65	
	To wages		1,297 00	
1873.			Dr.	Cr.
Jan'y	1. By cash of Harrison for hogs			30 00
	1. To expenses on same		25 00	
	By cash 10 hogs to Harrison			139 00
	By 1 cow to Walker			25 00
	By hides to Walker			9 60
Feb'y	3. By 4 home cattle to Gibson			120 00
	3. By 6 calves to Gibson			66 00
	By 11 fat hogs to Gibson			121 00
March	To 40 pounds flour, $2, and 20 bus. oats, $12, Delaplane		14 00	
87	15. To toll on corn		94	
	To sales of corn by Lawson, per statement			495 51
	22. To Newlon, 3 bbls. flour		29 50	
	24. To 17 bus. oats, at 60 c		10 20	
April	5. To Holmes, repairing pipes		3 00	
	17. To 100 lbs. joles		5 50	
June	14. By amount wool to Delaplane			40 08
Aug.	20. By sales of wheat	$ 69 94		
		229 58		
				299 52
Octo.	4. To cash for 45 lbs. bacon		5 40	
	31. By cash for pasturage	$680 66		
		$262 50		
				943 16
	To taxes			
	To wages			
Oct.	15. To 73 bushels wheat seeded in N. W. f'd			

Deposition of F. Lewis Marshall, taken Nov'r 10, 1873.

1st ques. by John S. Mosby, atty. for deft., Rob. B. Bolling. State

where you reside, and if you are acquainted with Bollingbrooke and Ben. Lomond.

Ans. I reside at Piedmont station, this county, and I am well acquainted with Bollingbrooke estate, and have been acquainted with it for years, but am not so well acquainted with Ben Lomond, though I know it pretty well.

2d ques. by same. Please state what, in your judgment, would be a fair annual rental value of these two farms from May, 1866, *for these two farms?*

Ans. I think a thousand dollars in money for the Bollingbrooke estate and three hundred for the other, per year, would be a fair rental.

3rd question by same. Do you mean by this that *is* would be a fair value if tenanted and farmed in the ordinary manner?

Ans. I think there is a great difference in a monied rent for money, &c. I mean that the sum I put upon these farms is a reasonable rent, farmed as these farms have been by Mr. Bolling, whose system has been to improve the land itself to a remarkable degree.

4th x-question by same. What, in your opinion, is the difference in the intrinsic value of the land now and in May, 1866?

Ans. I know that the land was higher in 1866 than it is now. I think this land would graze and fatten three times as many cattle now as it would just after the war.

88 Cross-questioned by Jas. V. Brooke, atty. for complainants.

1 x-question by same. Why should the intrinsic value of sod-land have improved since 1866?

Answer. Sod-land improves everywhere, so far as I know, by age.

2d question by same. Do you know how much, or about how much, sod-land is on these farms, and how old the sod-land on Bollingbrooke is?

Answer. I think there is about sixty acres of land been recently sowed in grass on the two places; the great majority of the land has been treated so as to run into sod by the sowing of seed upon the corn-land ground. I know that a very small portion, compared with other farms, has been ploughed up for corn, and that therefore the improvement of both farms in the production of grass and sod has been, to my view and observation, the object of the proprietor ever since the war.

3d question by same. Am I to understand from your answer that the greater part of Bollingbrooke has run into sod since 1866 by being put into corn and grass?

Answer. As far as I have observed, there has been less and less cultivating of the land since the war, but how much year by year has been ploughed up, put in corn, followed by grass-seeds, to get into sod, I do not know; but I am confident that the object of the proprietor has been to improve the grass-producing power of his farm all the time.

4th x-question by same. How much of Bollingbrooke was in old sod when the war ended; and was not it famous for the age and quality of its sod-land?

Answer. I do not know how much was in sod. After the war many fields that were in sod before and during the war were mutilated by the trespass of different stock, hogs especially, from which causes Bollingbrooke suffered as well as all the other farms in that region of the country. In the day of Mr. Tidball, during his life-time, he had several fields of remarkably fine sod, one especially. After his death, and before the purchase of the estate by Mr. Bolling, Mr. John Armistead, or Robert, worked a good deal of the land, that is, ploughed it up; how much I do not know. Since Mr. Bolling's occupation of it, his object has been,

a far as I can judge, *was* to get the land in sod, for which it was wel adapted; and by grazing corn-fed cattle on the same, has increased its productiveness in grass.

5th question by same. Please state what fields on Bollingbrooke not in grass in 1865 are now in grass, and what fields then in grass are not now in grass, and what portion of the original sod-land of Armistead's time remains in sod now.

Answer. I cannot tell what fields are now in grass that were not so in 1865, not going there year by year, and not being able to carry in my memory the land Mr. Bolling put in grass for so many
89 years; but I state that my observation of the farm, in frequent visits during the years from 1865 to the present time, that he has cultivated and plough' up less and less land every year, for the purpose of retaining the sod. The present year there only forty-five acres of the 701 *hundred* of the open land on the place, Bollingbrooke, that is in corn, and I believe about the like number that is now in clover. I cannot tell what fields were in grass in 1865 are not now in grass. I do not know what proportion of the land now in sod was in sod in Armistead's time.

6 x-question by same. How much was in sod in 1865, and how much is now in sod, describing the fields as well as you can?

Answer. I do not know how much was in sod in 1865. I believe that of the open land there is now in sod about five hundred and fifty acres of land *in sod*, one field in clover, and one in corn. The forty-five acres that is in corn is on the corner next up to Mr. Carr's land, in the north-west part of the tract, adjoining the road going across the mountain; and the thirty to forty acres immediately south of this corn-land in wheat is now in clover, having been in corn last year; the balance of the land is in sod.

7 x-question by same. You have said that the salable value of lands was higher in 1866 than now; please state to what extent or proportion the salable value of the land in the neighborhood of Bollingbrooke has been decreased since 1866?

Answer. I know that the Oakhill estate was sold for between fifty-four and fifty-five dollars per acre soon after the war, and has been resold in the last year for some forty-three dollars. Four hundred acres of my estate was sold in the last year for thirty dollars per acre, for which I believe I could have gotten, just after the war, as much as was obtained for Oakhill; but mine was depreciated by the manner it had been treated or farmed, and also by the general depreciation of lands. If it had been farmed as Mr. Bolling's has been it would have brought more. I should suppose the depreciation would be about twenty-five cents on the dollar.

8th x-question by same. What is the customary rental per acre of prime sod-land, for purpose of grazing, in the upper end of this county?

Answer. I have known as much as a dollar and a quarter per month being give' to graze and feed during the year. I have never known it repeated by any one, I suppose, for the reason of the damage that ensues to a man's sod by the desire of the owner of cattle to favor his own grass at the expense of the man who rents the grass. I suppose a man would give for from three to five months, upon prime sod-land, as much as two dollars per month per acre for large cattle.

Examination-in chief resumed:

1st question by Wm. H. Payne, atty., &c. Is the renting of grass a constant thing; and how often could a man expect to rent his land in this way?

90 Answer. It is not constant, but occasional, for the reason I stated above. I do not think one could rely upon renting his land, especially at such prices as I mentioned.

2d question by same. Do you mean to say that the number of acres of sod that you allotted to Bollingbrooke could be rented as a regular business for the months of each year at two dollars per acre for the sod. I mean is there *is* any market for five hundred and odd acres of land for from three to five months in the year at the price of two dollars per month?

Answer. As I stated before, it would be occasional; I do not think it could be relied upon.

3d question by same. You have spoken of the depreciation of land since the summer of 1866; has not the money of the country (greenbacks) appreciated, or gold depreciated as compared with greenbacks, in the same ratio?

Answer. I do not remember the relative value of gold and greenbacks in 1866. I know that gold and greenbacks are much nearer together in value now than then. When I said land had depreciated, I did not allude to any particular currency. I do not think lands could be sold for any currency, except at a great sacrifice. The sales of the lands to which I have referred were made in greenbacks. I mean the salability of land has depreciated greatly, irrespective of the value of the currency.

And further deponent saith not.

F. LEWIS MARSHALL.

Deposition of Bowles E. Armistead, taken at same time as last.

1st question by Wm. H. Payne. atty. for defendant, &c. Where do you reside? Are you acquainted with the farms of Bollingbrooke and Ben Lomond; and what are your opportunities for knowing them?

Answer. I reside near Piedmont station, this county. I am acquainted with said farms, and I was raised on the farm of Ben Lomond, and have known the two farms since I can remember anything.

2d question by same. What was the condition of these farms in 1865 and '6, and what is their condition now?

Answer. The Bollingbrooke farm at that time was left in the condition that most farms were left after the war; with gaps in the stone-fencing, needing ditching, ditches stopped up, and a great deal of the stone fence in very bad repair; the wood fencing also in bad condition. There was not much wood fencing on the farm any way; it was almost altogether stone fencing, in proportion to the *stone* fencing. The Ben Lomond had grown up a great deal in briers and thistles; fencing in bad repair; meadows very much grown up in bushes and weeds. Now all of Bollingbrooke is in sod except about eighty acres or ninety acres.

91 A large proportion of one field, which needed ditching very bad and that was wet and unfit for cultivation, has been thoroughly ditched and now in good condition; fencing, that encloses the farm, in good condition; with new lines of rock fence separating the fields where the old fence stood, in good condition. In regard to the timber on the farm, there has been very little used, Mr. Bolling using mostly coal; the entire farm kept and farmed in that condition which a man would treat a farm that he expected to leave to his children. The land has been well treated; corn bought and fed upon the place. As to Ben Lomond, the farm is in good condition; meadows well cleaned and fencing in very good repair, and about forty-five acres under culti-

vation; balance in fine sod, with the exception of about thirty acres in clover.

3d question by same. What, in your opinion, is the difference in the intrinsic value per acre of the land now and in 1866?

Answer. Considering the fencing, the ditching, cleaning up, grain fed upon the land and the difference between the grass now and then, I would put it at eight dollars per acre on Bollingbrooke farm increase in value now as compared with 1866, and I would put the increased value on the Ben Lomond farm at six dollars per acre.

4th question by same. State what, in your judgment, would be a fair annual rental of these two farms, with proper restrictions, from the 2d of May, 1866, to the 2d of May, 1873, and especially what would be a fair rent for the year 1866, possession delivered late in the spring of that year?

Answer. I would put the Bollingbrooke farm at twelve hundred dollars ($1,200) per year, and the Ben Lomond farm, at three hundred ($300) per year. Ben Lomond rented for four hundred dollars before the war, for I received part of the rent myself.

5th question by same. If possession was delivered in May, 1866, could a crop wheat have been planted, or corn, and gathered that year, and cattle bought and successfully grazed?

A. I think not.

(Question excepted to on two grounds: 1st, because possession in this case has never been delivered and no tenancy created by the plaintiff, the defendant having been in possession before and after that date; and secondly, because the question implies that a tenant is compelled to gather his crop during the year of renting, which after the wheat crop in every case.)

6th question. What rent, then, would you allow for the year 1866-'67?

Answer. No cattle could be bought at that time; the fencing out of repair; and, owing to the scarcity of stock to graze, and the condition of the times, I would put the rental for Bollingbrooke from 2d May, 1856, to 2d May, 1867, at $300, and Ben Lomond for same time not over the taxes—not even the taxes.

Cross-questioned by Jas. V. Brooke, atty. for complt.:

1st x-question by same. Supposing the tenant to have had on the farm between 140 and 150 head of cattle in May, 1866, which
92 he grazed on the place, and that he had the privilege of seeding wheat in the fall and reaping it for his own benefit, what would have been a fair rent for Bollingbrooke for the year beginning May 6, 1866?

(Question excepted to because it assumes as a fact what has not been proved as a fact and what was not a fact, and because Mr. Lersner never consented to have a crop pitched.)

Answer. I would estimate the value of the grazing of the cattle at seven dollars a head, provided it was a fair cattle year. So far as wheat is concerned, I consider a disadvantage to the farmer in that neighborhood. There was a farmer who rented a farm in that neighborhood—Joshua Fletcher—that year, and I do not think he made over five bushels to the acre.

2d x-question by same. How much of the Bollingbrooke farm was in sod in May, 1866, and how much of it was old sod?

Answer. I would suppose there was about 150 acres in old sod, and all of the balance of the land in coming grass or sod.

3d question by same. How much of that farm is in the old sod of which you spoke, and how much in new or coming grass?

Answer. The old sod is still there. I consider it all in good sod now, with the exception of ninety acres—I mean all the arable land; and of the ninety acres, forty-five acres in good stand of clover.

4th x-question by same. If exposed to sale, now would Bollingbrooke bring as much in the market as it would have brought in 1866; if not, what difference would exist? I speak of its salable and not its intrinsic value.

Answer. If there is anything in the increased value of the land, it would bring more. I think, if put up in the market, it would bring more than it would have in 1866.

5th x-question by same. Has there not been a falling off in the salable value of land in that country since 1866?

Answer. I do not know whether there has been or not so far as good land was concerned. Lands that have been badly treated, and forced into market, have sold for less.

6th x-question by same. What, in your judgment, would Bollingbrooke and Ben Lomond now bring, if sold upon usual terms of land sales, per acre—say, at one-fourth in hand and balance payable in one, two, and three years?

Answer. Bollingbrooke ought to bring fifty dollars, and Ben Lomond twenty-two dollars and a half; that is, if forced into the market.

7 x-question by same. Who has resided on Bollingbrooke since 1866; and of how many members has his family usually consisted, so far as you know?

Answer. Mr. Bolling's three sons, Bartlett, Townsen's, and Sam Bolling; and his daughter has resided there a part of the time, and Miss Mary Bolling has resided there some part of the time. Mr.
93 Bolling has been there a part of the time. I could not call him a resident.

8th x-question by same. Did not the parties you have named constitute the family of Mr. Robert Bolling, at Bollingbrooke?

Answer. Part of them did. I do not know whether all of them were or not of his family. Miss Mary Bolling is a cousin of Mr. Bolling's.

9th x-question by same. Was not the Bollingbrooke establishment, during the period since 1866, kept up by Mr. Robert Bolling in the style common to gentlemen of wealth and enlarged hospitality, and largely visited by guests?

Answer. Mr. Bolling's house has been kept as a gentleman's house. I would not consider that it has been largely visited by guests.

10th x-question by same. What was the condition of the barn in 1866, and what is its condition now?

Answer. The barn has no roof upon it now, nor had it any in 1866. I suppose you have reference to barn he began to build and did not finish. I noticed the other day that it had no roof on it, but the walls seemed to be in good condition and the timber seemed to be somewhat decayed.

Examination-in-chief resumed:

1st question by Wm. H. Payne, atty., &c. Read the 1st x-question, and suppose *the*, instead of the facts recited there, the cattle had been procured in November, 1865, and the cattle had been , would not the value which you have put upon the grazing of the cattle, in answer to the 1st x-question, be dependent upon the size and condition of the cattle in the spring of 1866?

Answer. Yes, very much.

2d question by same. What was the condition of cattle picked up at

Government sales, and what would be the value of the grazing of such cattle purchased in May, 1866, and sold during that year?

(Question excepted upon the ground that the defendant's own exhibit shows that he bought the most of the cattle at $50.00 per head, and that they were sold at a large excess upon the cost, and there is no evidence of any purchase *of* Government sale. Exception taken by J. V. Brooke, atty., &c)

Answer. All the cattle I saw picked up at Government sales, which was one, probably two, were in bad condition. Some had the foot evil. The grazing of such cattle would not be worth more than a few dollars, if that. I never saw any Government cattle sold.

And further deponent saith not.

BOWLES E. ARMISTEAD.

Deposition of Bartlett Bolling, taken November 11, 1873.

1st question by Wm. H. Payne, atty. for Robt. B. Bolling.

94 State where you reside, how long have you resided there, and where were you during the war.

Answer. I reside at Bollingbrooke, near Upperville, in this county. I have lived there since the year 1853. During the war I was at Bollingbrooke.

2d question by same. Will you state whether any, and what, depredations were committed during the war upon the estates of Ben. Lomond and Bollingbrooke?

Answer. All the stock was taken off, with the exception of a very few. A great many things were taken out of the house by Geary and his men, and everything pretty much destroyed.

2d question by same. What was the condition of these two farms in 1865, and what *are* their present condition, with respect to fencing, ditching, productiveness, &c., &c.?

Answer. In 1865 they were in very poor condition, with very little upon either; fences down, very little grass on the places, ditches in bad order. Since then they have been ditched and fenced, more fine grass on the places than I have known, and the farms have been improved generally.

3d question by same. What has been the result of the farming operations since the war?

Answer. My experience has been that there has been very little if anything made, after deducting expenses. I should say that there had not been made on the two farms over four or five hundred dollars.

(Question and answer excepted by Jas. V. Brooke, attorney for Lersner.)

4th question by same. From what source, then, has the hospitalities of Bollingbrooke been kept up?

Answer. From money received otherwise than that received from the farms.

5th question by same. Please examine the accounts filed with Townsen' S. Bolling's deposition, marke' "1 B, &c.," and state from what sources the items stated in said accounts were derived, and whether they represent facts within your knowledge.

Answer. I helped in part to make out these accounts. They are taken from the books, account of sales; and, far as I know, they are *they are* the facts taken from these sources, and nothing was omitted. Some of the items do represent facts within my knowledge. I would say the account of 1870 is correct. I remember the items in it. In 1871 I re-

member some of the items. They were put down by my father and brother. After examining the account of 1871 more carefully I recognize all the items except one, and that is as to some wheat sold Lawson.

6th question by same. Please examine the papers shown you, marked "2 B," with Bartlett Bolling's deposition, and say by whom the accounts were kept, and whether they are correct statements of the farming operations of Bollingbrooke and Ben. Lomond, to which they refer.

95 Answer. These accounts were kept by me. They are correct statements and were taken from the book, which was regularly kept, and represent five years of farming operations, from 1868 to 1873 inclusive, at Ben Lomond.

(Plaintiff, by counsel, objects to so much of the foregoing deposition as relates to the actual profits or losses of the farming operations of the defendant, or seeks to introduce as evidence any of the paper-writings referred to as copies.)

Cross-questioned by Jas. V. Brooke, atty., &c.:

1 x-question by same. Please specify what articles of household and kitchen furniture were taken away by General Geary and his men, or destroyed by them.

Answer. There was no household and kitchen furniture taken away, and none destroyed by them.

2d x-question by same. How many cows were on Bollingbrooke and Ben Lomond on the 6th day of May, 1866?

Answer. I do not remember as to that particular date, but just after the war there were five or six; I am sure there was not more.

3d x-question by same. Do you know that any cows or calves were taken by the public enemy or by our armies after the 19th January, 1863, from Bollingbrooke and Ben Lomond? If so, please state the number so taken, when, and by whom.

Answer. I do *not* know when they were taken, but cannot state the date; did not keep a memorandum of the time they were taken. The Yankees were there off and on all the time. I do not remember the number we had, but all were taken except the number I have mentioned—five or six. We generally had a large number of cows and calves. I do not know by whom they were taken. They were taken by the Yankee army, but they came in at different times, and I cannot say who took them. I even cannot say by what special command they were taken.

4th x-question by same. Do you know of any cows or young cattle being sold after the 19th January, 1863, or being used for the consumption of the family at Bollingbrooke after that period and prior to May, 1866?

Answer. I do not know of any being sold; I do not know of any used for the consumption of the family at Bollingbrooke; there may have been.

5th x-question by same. Were as many as seventeen milch cows and fifteen calves or young cattle taken from Bollingbrooke and Ben Lomond by the Yankees after January, 1863?

Answer. I do not know as to the milch cows, but I would say they took off twenty-five or thirty cattle, including milch cows.

6th x-question by same. From what source was the establishment at Bollingbrooke supplied with fresh meat from the 19th January, 1863,

until the termination of the war, and thereafter until the 6th May, 1863?

96 Answer. Some of it was bought, and some of it may have been taken from the farm.

7th x-question by same. From whom were purchases of fresh meat made during that period? And if there be any memorandum of an account kept, please refresh your memory from it.

Answer. I do not know from whom they were bought. I do not know of any memorandum of said purchases.

8th x-question by same. Am I to understand from your answer that you do not remember what stock was killed for the consumption of the family, or that none was killed during that period for that purpose?

Answer. I think there may have been some killed from the farm.

9th x-question by same. Do you not know that some of the stock on the farm during that period was used for the consumption of the family at Bollingbrooke?

Answer. I can't say positively. I will repeat what I have said: *They* may have been some; possibly there was some.

10th x-question by same. Who had the office of providing supplies for the Bollingbrooke establishment during said period?

Answer. My father; he was caterer and provided the supplies.

11th x-question by same. How many mules, sheep, and work-oxen were on Bollingbrooke and Ben Lomond when the war ended, and how many on the 6th of May, 1866?

Answer. There was one mule, about six sheep—they were lame, and frightened to death, and wounded—and four oxen. I do not remember how many of such stock were on the place in May, 1866.

12th x-question by same. Will you state whether any oxen on these farms on the 19th January, 1863, were afterwards disposed of, and how?

Answer. I do not remember of any being disposed of; do not recollect.

13th x-question by same. Were any oxen taken by the Yankees; if so, when, and how many?

Answer. I think there were some taken by the Yankees; I do not know how many, but I think four, as we had eight, I think.

14th x-question by same. Do you know of the disposition of any mules made after the 19th January, 1863?

Answer. No; I think that is about the time they were taken by the Yankees; they were all taken by the Yankees but one. I remember the mules were taken by Geary.

15th x-question by same. Are you positive that the mules were taken by Geary, and do you or not mean by Geary General Geary?

Answer. Yes, I can say I am almost positive they were taken by Geary; I mean General Geary.

(Question excepted to because it is equivocal—the witness has said nothing to point these mules as those sold to Lersner, and if they were not, then the question is irrelevant—by Wm. H. Payne, atty. for Bolling.)

97 16th x-question by same. Were any of the sheep on Bollingbrooke and Ben Lomond on the 19th January, 1863, thereafter disposed of or used in the necessary consumption of the family?

Answer. I believe that there were some used, how many I do not know; there were none disposed of.

17th x-question by same. How many hogs and shoats were there on the farms when the war ended?

Answer. I do not believe there were any hogs on the place when the war ended.

18th x-question by same. How many hogs and shoats were there on these farms on the 19th January, 1863, the date of the alleged purchase of said farms by the plaintiff?

Answer. I do not remember, but my opinion is that there were few.

19th x-question by same. What disposition was made of the hogs and shoats then on the farms, and were any of them used for the necessary consumption of the family?

Answer. I suppose, like the sheep and all other stock, they were taken by the Yankees. I can't say whether any were used or not by the family; they may have been. I know we were always buying bacon.

20th x-question by same. Please charge your memory and state whether in the winter of 1863, 1864, or 1865 there was pork killed and put up from either of these farms.

Answer. Yes, sir; there was pork put up. We frequently bought hogs as well as bacon. There was some put up from the Bollingbrooke farm.

21 x-question by same. During the period from the 19th January, 1863, until the 6th May, 1866, of how many members, both white and black, did the family at Bollingbrooke consist, and of how many since the last date, usually?

Answer. It consisted of a hundred, including whites and blacks, part of the time, up to the 1st January, 1866, at which time our negroes left us; after that can't say the exact number, but probably a dozen. From May, 1866, the number of the family has been from twelve to twenty, I suppose; some years more and some less.

22d x-question by same. Of what members has the white family at Bollingbrooke usually consisted since the 6th day of May, 1866?

Answer. Well, I suppose there was an average of about five whites since that time.

23d question by same. How many riding and carriage horses have usually been kept on said farm since May, 1866, and how many during the last three years?

Answer. We have been raising horses. I could not say the number of riding and carriage horses have been kept. In 1866 there were not many; there are more now. I can't say how many have been kept during the last three years.

24 x-question by same. Have carriage and riding horses been kept there every year since 1866, and how many are now there?

98 Answer. There have been riding and carriage horses kept there every year since 1866. I reckon there are there now six that we use exclusively for that purpose—two of carriage horses, and the rest of riding.

25 x-question by same. How many horses and colts are on these farms not actually employed for purposes of cultivation?

Answer. We have ten that are employed, and there are thirty-two other horses and colts on the two places at this time.

26th x-question by same. You speak in a former answer of raising horses; please state whether you have raised them for purposes of sale or private use, and how long the business of raising horses has been carried on on these farms.

Answer. We have raised them for both purposes. I think we commenced to raise horses in 1867 or 1868, then on a very small scale; since 1870 we have increased.

27 x-question by same. Has the business so far been a profitable or unprofitable one?

Answer. The business so far has been an unprofitable one.

28th x-question by same. Do I understand you to mean, that, taking into the estimate the stock you have on hand, the business has been unprofitable?

Ans. Yes, sir; since we find it a hard matter to sell a horse.

29th x-question by same. Putting the stock you have on hand at what you estimate it ought to sell for, has the business been unprofitable?

Answer. I should say it has, as compared to other business that we might have gone into—stock-raising and the grazing of more cattle.

30th x-question by same. From what quarter has the grain and provender used in this unprofitable business been obtained?

Answer. Some of it has been made on the farm, and the rest has been bought. Nearly every year we have bought corn and provender.

31st x-question by same. Was the corn and provender raised on the farms used as far as it would go in the feeding of these horses and colts in common with other stock on the farm?

Ans. It was used in common with other stock on the farm.

33d x-question. Has not the establishment at Bollingbrooke, since 1866, been maintained upon the same footing of good living and hospitality as similar establishments usually are; and has there not been much visiting from friends and acquaintances during that period at Bollingbrooke?

Answer. Yes, sir; it has. I think there has been much visiting of friends and acquaintances during that period at Bollingbrooke.

Examination-in-chief resumed:

1st question by W. H. Payne, atty. &c. Was the hospitality and state that you have described kept up by Bollingbrooke, or other outside resources?

99 Answer. It was kept up by other outside resources, and not from the farm.

2d question by same. Have any oxen, cows, or mules been sold from the farm since the 19th Jan'y, 1863?

Answer. I think not. I know of none; after reflection, I remember that the blind mule that was left was sold for ten dollars.

2d question by same. You said you thought some sheep were used upon the farm; if so, can you say whether these sheep were part of those upon the premises on the 19th Jan'y, 1863?

Ans. I cannot say whether they were part or not, though they may have been some.

3d question by same. You have said there was some pork put up on Bollingbrooke during the war; can you say whether this was from the stock on hand the 19th Jan'y, 1863, or from hogs bought afterwards?

Answer. I cannot say; I rather think it was from hogs we bought.

4th question. When was Gen'l Geary operating in the neighborhood of Bollingbrooke?

Answer. I can't say positively; but I think it was the latter part of 1862.

Cross-examination resumed:

1st x-question by Jas. V. Brooke, atty., &c. Do you mean to say in your answer to the 3d question above, that there were hogs bought between Jan'y, 1863, and the close of the war, which were put up into pork? If so, state when and from whom.

(The defendant, by counsel, objects to this examination, because in the re-examination no new matter was brought out.)

Ans. Yes, sir; I do mean to say that hogs were bought and put up into pork during that period. We bought both hogs and pork. I do not know from whom.

And further deponent saith not.

BARTLETT BOLLING.

Paper "2 B, with deposition of Bart. Bolling.

1868.		1868.	Dr.	Cr.
Oct.	17.	To cash paid Wm. Gray for 56 hd. of cattle, @ $45	2,520 00	
Dec.	31.	To cash paid farm-hand expenses	113 00	
		To " for provisions supplied for the year to laborers	40 00	
1869.		1869.		
July	18.	To cash paid for six shotes @ $2.50, bo't of T. W. H.	15 00	
100 Mar.		4. To cash paid for eight shotes, @ $4, bo't of A. Glascock	32 00	
	27.	To cash paid for 38 bushels of oats @ 62½ cents	23 75	
	28.	To cash paid Jeffries for 37½ bbls. of corn, @ $4.	150 00	
April	9.	To cash paid Irish Jack for 10⅔ bbls. corn, @ $4	42 67	
	21.	To cash paid Mr. Loughborough for 5 bbls. corn, @ $4	20 00	
June	4.	By cash received for 3 head of cattle, Mount & Carter		239 52
	29.	By cash rec'd for 18 head of cattle, sold Mount & Carter		1,464 75
Sept'r	2.	By cash rec'd for 19 head of cattle, sold in Baltimore		1,154 25
Oct.	25.	To cash paid for 10 shotes, @ $4, and 2 at $3.50	47 00	
Nov.	13.	To cash paid for 141 rods of ditching, @ 50 cents per rod	70 50	
Dec.	31.	To cash paid two regular hands, @ $120 per year	240 00	
	31.	To cash paid board for above two hands	72 00	
	31.	By cash received for 16 head of cattle, @ 70 per head		1,120 00
	31.	To cash for extra labor, $53 and board for same, $25	78 00	
1870.		1870.	Dr.	Cr.
Jan'ry.	1.	To cash paid Hennfer for 22 h'd of cattle, @ $45.50	1,001 00	
	7.	To cash paid Festus, for making 2 gates, @ $4.00	8 00	
Apl.	19.	To cash paid for four bushels of clover-seed	35 00	
June	9.	By cash rec'd for 150 bushels of corn, sold by Lawson		144 76
Oct.	20.	By cash rec'd for 22 h'd of cattle, sold in Balto.		1,617 00

Dec'r.	31.	To cash paid two regular hands at $120 per year	240 00	
	31.	To cash for board for above two hands	72 00	
		To cash for extra labor	115 00	
		To cash for board, for extra labor	36 00	
		To taxes		
101	1871.	1871.		
Jan'y	1.	To cash p'd Heninger, for 40 head of cattle	1,881 94	
Mch.	14.	To cash p'd for 30 bushels of seed-oats, @ 50 cts	15 00	
April	1.	By cash from Delaplane for 109 bush. of oats, 47 cts		51 23
Ju'e	17.	By cash paid for 7 h'd of cattle s'd in Georgetown		381 32
Oct'r	9.	By cash p'd for 18 h'd of cattle s'd in Baltimore		869 67
	17.	By cash rec'd from Delaplane for bacon		38 00
Dec.	31.	To cash paid 2 regular hands @ $120 per year	240 00	
		To cash paid board for above 2 hands.	72 90	
		To cash p'd for extra labor	35 00	
		To cash paid board for extra hands	24 00	
		To taxes		
1872.		1872.	Dr.	Cr.
Jan'y	1.	To cash p'd Heninger for 25 h'd of cattle	778 00	
	17.	To cash p'd for 8 hogs bo'g't of J. L. Adams	40 50	
Feb'y	5.	To cash p'd for 8 shotes bo't of J. L. Adams	31 50	
Mch.	18.	To cash p'd for one rick of straw, bo't of E. P. Tayloe	12 00	
Apl.	11	To cash p'd John Gray for 155 h'd of cattle	540 00	
	16.	By cash rec'd of Harrison for 6 hogs		41 50
Ju'e	13.	By cash rec'd for 10 h'd of cattle s'd in Balto		548 92
Aug't	7.	By cash rec'd for 654 lbs. of bacon s'd Delaplane, at 9 cts		58 86
	9.	By cash rec'd for 146 bushels of wheat s'd by Lawson		202 13
	12.	By cash received for 11 fat cattle sold Harrison, 11,340 pounds, @ 5 cts		567 00
Sept.	9.	By cash received for 13 head of cattle, sold J. L. Adams, @ $53 00		689 00
Oct'r	28.	By cash received for 4 head of		
102		cattle sold J. L. Adams, @ $55.00		220 00
Dec'r	9.	By cash received for two head of cattle sold J. L. Adams, @ $45.00		90 00
	11.	By cash rec'd for 2 hogs sold D. Gibson		29 50
	27.	By cash received for 229 bushels corn and six bushels of peas		114 82

	31. By cash p'd for 340 shocks of fodder @ 30 cents, sold to J. W. H.....		102 00
	31. By cash for 1 rick of straw s'd C. B. Hite		13 00
	31. To cash p'd two regular hands @ $120 per year.....	240 00	
	31. To cash paid for board for above two hands.....	72 00	
	31. To cash paid for extra labor.....	30 00	
	31. To cash paid for board for extra hands	18 00	
1873.	1873.	DR.	CR.
Mch.	24. To cash p'd for 17 bush. of oats, at 60 cts.....	10 20	
June	3. By cash paid by Mr. Dawson, for one month's pasture, 15 head of cattle..		25 00
July	19. By cash p'd by Fletcher for 2 mos. pasture of 30 h'd cattle		120 00
Aug.	22. By cash rec'd for 53 bushels of wheat s'd by Lawson		69 94
Aug.	29. By cash paid by Gibson for one mos. pasture of 25 h'd.....		50 00
Aug.	31. By cash paid by Middleton for 4½ months' pasture of 6 h'd, at 2.50 per h'd		67 50
Oct.	14. To cash p'd for 45 pounds bacon, 12 cts.....	5 40	
Oct.	15. To cash paid for extra labor to date...	22 50	
	15. To cash paid board for above labor...	9 00	
	31. To cash p'd for two regular hands at $120 per year.....	240 00	
	31. To cash paid for board for above two hands.....	72 0	

103 And on the 17th December, 1873, defendant filed exceptions in these words:

LERSNER *vs.* BOLLING.

The defendant, Robert B. Bolling, excepts to the report of Com'r Shepherd, dated 27th Nov'r, 1873:

1st. Because in crediting said Bolling with the value of the drafts paid Caldwell & Shannon, the commissioner has failed to allow him damages at the rate of ten per centum. upon the principal thereof in conformity with section 9 of chapter 144 of the Code of Virginia, the same being bills of exchange drawn and endorsed within this State, and payable without the United States, and having been protested for non-acceptance. Should this exception not be sustained, the defendant excepts to the failure of the commissioner to credit him by the $100 paid by him to the counsel of Caldwell & Shannon as his fee.

See Bolling's answer, p. 31 of printed record.

2nd. Because in ascertaining the value of said drafts, the commissioner has put them at their gold value, and not at their value in currency, although he sets off against the value so ascertained in gold the estimated value in currency of the household and kitchen furniture.

3d. Because he has reported estimated and conjectured rents instead of reporting the actual rents and profits realized by Bolling, although there was sufficient evidence to show what the actual rents and profits were; and there is no reason to believe that they were not as great as they would have been if the estate had been in the hands of any other judicious manager, having the same regard for the interest of the owner.

4th. Because the comm'er has failed to give Bolling credit in any form, by the increase in the value of the land arising from the mode in which it has been used and managed by him. Bolling has treated it as his own property, with an eye directed solely to its permanent improvement, without regard to present profit. Its fee-simple value has thus been so largely increased that the owner can well afford, in consideration of such increase, to forego all claims for rent. Indeed the increase in value exceeds the aggregate of any rents that could reasonably be charged for it. Bolling supposed that he and his children would reap the benefit of the course thus pursued by him; but under the decision of the court Lersner is the party who will receive it. It is manifestly unjust that he shall be permitted to do so, without allowing Bolling credit therefor.

5th. Because, if it was proper for estimated rents to be charged, the amount has been put by the commissioner largely above what would be a reasonable rent, according to the testimony in the cause. The same weight is given by the commissioner to the testimony of
104 prejudiced witnesses, (like Carr,) as to that of the most impartial and judicious ones; and estimates based upon the condition of the estate as improved by Bolling's management, and upon the assumption that Bolling possessed capital sufficient to purchase cattle and thus make the farm more profitable for grazing than it could be otherwise, have been accepted by the commissioner as furnishing him with the means of arriving at a correct result, thus increasing the charge against Bolling for rent, because he happened to be possessed of capital; and because of the enhancement, created by himself, in the value of the land, at the same time that he allows him no credit whatever for this very enhancement, though attained at the loss of annual profit to himself from the use of the land.

6th. Because the commissioner has charged interest upon estimated and conjectural rents.

7th. Because the commissioner has not reduced the charge for the rent of 1866–'7 below that of the other years, although it is manifest that the rent should have been estimated at less for that year than for the others.

8th. Because the commissioner has failed to allow Bolling sufficient credit for his improvements, independently of the generally enhanced value of the land; he allows him credit only for the amounts shown to have been expended in ditching and stone-fencing, and he has (accidentally) omitted a credit of $15.75 paid for stone fencing in 1869. He should have allowed credit not only for the ditching and stone-fencing, but also for the fencing (other than stone) the gates made and put up, the repairs to the house, the pump, the grass seed, and the plaster, by all of which the land was permanently improved, and the actual cost of which to Bolling, as appears by account 1 B, was very considerable.

Reference is here made to that account as showing the items thus omitted by which Bolling should have been credited, it being deemed unnecessary to specify them in detail, in this exception, as the whole class of such charges has been excluded by the commissioner. In addition to the amounts paid by Bolling for the lumber for the fencing

&c., he should be allowed for the labor paid for and furnished by him in erecting it.

ROBERT B. BOLLING,
By his Counsel.
WILLIAM H. PAYNE.
WM. J. ROBERTSON.
JNO. S. MOSBY.

1873, DEC'R 17TH.

And in said circuit court, 17th December, 1873:

The defendant, by counsel, this day presented a petition for a rehearing of the decree of this court, entered on the 17 day of April, 1873, directing the decree of the special court of appeals of January
105 27, 1873, to be entered as the decree of this court, together with sundry exhibits accompanying said petition; and the plaintiff, by counsel, objected to the filing of said petition and exhibits, but the court, overruling said objection, doth allow said petition and exhibits to be filed, whereupon said defendant filed said petition and the exhibits aforesaid; and the said petition and exhibits filed therewith, being examined by the court, and the matters contained therein being duly considered, the court being of opinion that the said rehearing cannot be properly granted, doth reject the prayer of said petition.

The petition mentioned in the foregoing decree and papers filed therewith are in these words:

To the judge of the circuit court of Fauquier County:

In a suit in chancery between Gustavus Lersner, plaintiff, and Robert B. Bolling, defendant.

The petition of the defendant, Robert B. Bolling, respectfully shews that in this suit, on the seventeenth of April, 1873, although this defendant insisted that this court should not enter as its own the decision produced as the decree of the special court of appeals, and that thereupon no execution should issue nor any proceedings be had to carry the same into effect; and although this defendant insisted that the said decision is null and void on the grounds stated and set forth in his written objections, then filed and ordered to be made a part of the record in this cause, yet this court did then order that said decree of the special court of appeals should be entered as the decision of this court, and did decree that one of its commissioners should take a certain account and report his proceedings to the court. Your petitioner thinks himself aggrieved by the said order and decree so made on the 17th of April, 1873, and prays a rehearing upon all the said grounds. He insists that the action of this court, in ordering that said decree of the special court of appeals be entered as the decision of this court, and directing one of its commissioners to take such account as before mentioned, is not only not according to the constitution of the State of Virginia, but is repugnant to the first section of the first article and the fourth section of the fourth article of the Constitution of the United States, and to the fifth and tenth articles of the amendments to said Constitution, and repugnant to the fourteenth amendment of said Constitution. The decision of this court is against the title, right, privilege, or immunity specially set up and claimed by him under said Constitution. He claims that under said Constitution, whereby the United States guarantee to every State in the Union not a despotic but "a republican form of government," it is his right not to be deprived "of life, liberty, or property, without due process of law;" that there was not "due pro-

cess of law" when "under the act of the general assembly of
106 Virginia;" to "provide a special court of appeals," approved February 28, 1872, (Sess. Acts. pp. 98, 99,) steps were taken to deprive him of his property without giving him an opportunity of being heard by counsel as to the unconstitutionality of the act; that there has been no opportunity of being heard on this question before any appellate court; and consequently there should be an opportunity of being heard upon it before this court. The argument that there was an opportunity of being heard upon it before the special court of appeals is without any foundation whatever. The question was not argued before the judges of that court, for the very sufficient reason that they could not pass upon it consistently with the constitution or with the common law. In the language of the constitution of Virginia they were "so situated as to make it improper for them to sit" on the hearing of this matter. In the language of the common law each of them had in this matter such an interest as would have disqualified a witness under the old law; and he was disqualified as a judge." (Demes v. Grand Junction Canal Co., 3 Ho. of L., 786, 16 Eng. L. &. Eq., 71.) It would not only have been a great violation of law, but it would have been exceedingly indecent for any man to proceed as judge to determine a matter, if by determining it one way he was to receive such compensation as is mentioned in the 6th section of the act of Feb. 28th, 1872, and by determining it the other way he was to receive no such compensation. Nor has there been any opportunity of being heard before the supreme court of appeals. There certainly had been none when, on Saturday, the 20th day of April, 1872, that court adjourned, after assigning fifty causes to the special court, without hearing or consulting counsel about it, and there has been none since.

Your petitioner being advised that it is "just and expedient," not only prays for a rehearing upon all the said grounds, (Hume v. Barton, 39 Eng. L. & Eq. 460,) but also prays that he may be at liberty on the rehearing to adduce the documents herewith exhibited, (Wiltsshire Iron C., L. R. 3 ch., App. Cas. 448,) to wit, a duplicate of a communication of the 26th of August, 1872, from one of your petitioner's counsel to the president of the supreme court of appeals; a reply thereto of the 28th of August, 1872; a duplicate of a communication of the 9th of Sept., 1802, from the same counsel to said president; a reply thereto of the 19th of that month; letters of the 25' of that month, and of the 19th Nov., 1872, to Jas. Alfred Jones, esq., from the same counsel; and a communication of the 13th of Feb'y, 1873, from that counsel to the judges of the special court of appeals; which documents are marked respectively and successively, No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, and No. 7, and shew the uniform desire of your petitioner's counsel for a hearing before the supreme court of appeals, and the constant difficulties in the way of obtaining such hearing.

THE PETITIONER ABOVE-NAMED,
By his Counsel.

107 We, being counsel in the circuit court in the cause above-mentioned, certify that we conceive that the cause is proper to be reheard on the grounds mentioned or referred to in the petition; and that it is proper that the documents which are marked No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, and No. 7, and exhibited with the petition, should be adduced at the rehearing.

WM. J. ROBERTSON.
WILLIAM H. PAYNE.
JNO. S. MOSBY.

Exhibit No. 1 with foregoing petition

THE VINEYARD, NEAR WASHINGTON CITY,
August 26, 1872.

To RICHARD C. M)NCURE, Esq.,
President of the Supreme Court of Appeals of Virginia :

DEAR SIR: Having for some time declined practice in Virgin'a in any other court than the supreme court of appeals, my concern was at least as great as that of my associate. In a letter of the 21st of April, 1872, Mr. Jones says: "On Saturday the court adjourned, after assigning 50 cases to the special court, Lersner & Bolling being one of the last on the list of 50. The court did not consult counsel about it; it merely swept off the first fifty. I am very sorry for it." On being informed that the case of Lersner v. Bolling, which I had undertaken to argue before that court, was one of fifty cases certified to a special court of appeals, you may perhaps remember some intimation of this concern, though it was briefly made, during the few moments that we were together in Richmond, on the evening of the 19th of July.

Conceding that under the existing constitution a special court of appeals, to consist of only three judges, may be formed of judges of circuit courts to try cases on the docket of the supreme court of appeals "which cannot be otherwise disposed of with convenient dispatch;" conceding also that there are on the docket some cases which may *be* properly be tried by the special court, and to the trial of which by it no party will object, yet I think all must admit that three circuit judges are not always a good substitute for five judges of the supreme court of appeals, but that there are some cases a decision whereof by the highest judicial tribunal in the State is desirable and important; and I respectfully submit for the consideration of yourself and your associates that Lersner v. Bolling is one of these cases, involving as it does a subject of great value, and, in respect to the doctrine of specific performance, important principles of equity jurisprudence, with some of which it is believed many members of the bar and some judges of circuit courts have
108 not very great familiarity. Clearly this is a case which should be heard and determined by the supreme court of appeals, if by this tribunal the same can be "disposed of with convenient dispatch," within the meaning of the constitution.

To ascertain the meaning of that instrument in this respect, regard may be had to the precedent of 1848, to what was done after the house of delegates by its resolution of the 13th of January, 1848, requested the revisors to report to the house a plan for promoting the dispatch of business in the court of appeals. The report made by the revisors on the 24th of that month (Doc. No. 48) was followed by the act of March 31, 1848. (Sess. acts 1847-'8, p. 51, ch. 68.)

The general assembly on the one hand approved the principle "that a cause in the supreme court of appeals shall be heard before a special court if it be necessary to prevent the hearing of the cause being delayed an unreasonable length of time," (5 Gratt., pp. 571, 572;) and, on the other hand, was careful to provide for a hearing in regular turn by the supreme court of appeals of cases which could be heard by it without being delayed an unreasonable length of time. Under the act of March 31, 1848, § 3 and 5, the special court did not sit in the summer, but commenced its session in December and proceeded during the winter and sometimes part of the spring. On the docket made out for it, under the 4th section, there was to be placed no case where any party by himself or

his counsel shall object thereto. While under other provisions of the act of 1848 a sufficient number of causes went to the special court, this enabled a party to retain for hearing by the supreme court of appeals a cause which he thought ought to be determined by that court. This provision was constantly made use of to prevent a case going to the special court, which it was believed might be determined as soon or nearly as soon by the supreme court as by the special court. This of itself furnished great security for a hearing in regular turn by the supreme court of cases which could be heard by it without being delayed an unreasonable length of time, and that security was greatly increased by the following provision, recommended by the revisors and enacted by the legislature as part of § 5: "In the interval between the time at which the court of appeals at Richmond may commence its session, in the fall, and the time at which the special court may commence its session, in December, the said court of appeals at Richmond may hear and determine any cause which may remain depending therein, notwithstanding it may have been on the docket so made out under the preceding section." Such was the act whereby the revisors and the legislature endeavored to steer between Scylla and Charybdis; such was the act the constitutionality of which was most elaborately discussed before the supreme court of appeals, and which was sustained by it as valid at January term, 1849, in Sharp v. Robertson, 5 Gratt. 518, and the leading principle of that act was in the view of the framers of the constitution, and by them
109 recognized and approved, when they authorized a special court to try cases "which cannot be otherwise disposed of with convenient dispatch."

If the provisions of the act of 1848, to which I have just referred, had been distinctly embodied in the act of Feb. 28, 1872, there would have been such objections as would have prevented the case of Lersner and Bolling from being certified to the special court; and in my 67th year I would have been spared the great annoyance of going before that court in July, when the excessive heat interfered with sound sleep and caused want of appetite, and for the time being impaired my physical strength and mental power. Though what I said orally did, when taken in connection with my printed note and the views of other counsel on the same side, seem to me as much as ought to be required to dismiss the plaintiff from a court of equity, yet it was not such an argument as I could and would have made at any season in which I have been accustomed to appear before the supreme court of appeals in Richmond.

In this important cause my paramount desire is for the due administration of justice. That, I think, will be rendered more secure by a new argument of the cause, and by having the new argument before the supreme court of appeals. I think also that by this course the judges will—and by a different course they will not—support the constitution; for it seems to me that, consistently with the constitution, the supreme could not in April certify to a special court as many as fifty cases, except upon the supposition that they would be tried and determined by the special court before they could be disposed of by the supreme court with convenient dispatch. And now, against the supposition of what might be a fact, we have what is found to be the actual fact. For the record of the special court filed in the clerk's office of the supreme court shows that Lersner v. Bolling and some others of the 50 cases remain depending, and that the special court has adjourned until the third day of December, whereas the supreme court is to meet in Richmond on the first day of November. Now, I submit to the judges of the supreme

court that in the course to be pursued in November they should be governed by the following considerations:

The jurisdiction of the special court is limited by the constitution to the trial of cases "which cannot be otherwise disposed of with convenient dispatch. The act of February 28th, 1872, does not and could not confer upon it any larger jurisdiction; it limits the special court to the trial of such causes "as the court of appeals cannot dispose of with convenient dispatch." Such of the 50 causes certified to the special court as now remain depending may be causes which that court could not dispose of with convenient dispatch, but cannot now be truly said to be causes which "the court of appeals cannot dispose of with convenient dispatch." One or more of the judges of the special court might be interested in, or from other reason, unable to determine some of these causes, and yet the supreme court of appeals may be able to hear and determine the same. I submit that action by this court, in the terms of the 5th section of the act of March 31st, 1848, will be according to the present constitution; and therefore that such of the fifty cases certified to the special court as remain depending should, according section 20 of ch. 182 of the Code of 1849, pp. 686-'7, be heard by the supreme court at its November term in the order in which the records were received. In other words, Lersner vs. Bolling should be heard by this court at said November term in preference to cases which stood after it on the docket at the time of the court's adjournment in April.

It seems to me that constitutional difficulties will be best avoided by judicial action in accordance with these views.

(Though mindful of the provision in the bill of rights that the legislative powers should be separate and distinct from the judiciary, and of the maxim "delegatus non potest delegare," I deem it unnecessary at this time to consider particularly so much of the act of Feb. 28th, 1872, as empowers the court of appeals to designate judges to constitute a special court to act in its stead. It may be that objection on this ground will not be made in such of the fifty cases as have been decided. Certainly, by the course suggested in this communication, it will be obviated in such of the fifty cases as remain depending. Moreover, the general assembly, when it meets, may amend the act as to this matter, and also as to the number of judges, and in other respects. I hope and trust that neither L. v. B., nor any other case involving important principles, and a subject of great value, will be left to the final det'rmination of the special court, consisting of only three circuit judges.)

They are now laid before the judges in vacation at an early period, after their coming together at Staunton, in order that they may have an opportunity of conferring upon and considering the subject before they meet at Richmond; and, in the mean time, of giving such instructions to the clerk there, and having such communications made to adverse counsel as they may deem proper.

Though Lersner v. Bolling may be the last case to be argued by me in Virginia, yet my desire to discharge my whole duty in the case is none the less on that account. After a careful examination of the record and authorities, I have a decided opinion, a thorough conviction (I say this without any bias from a contingent fee, large or small; I am not to gain or lose by the result of the cause) that, according to principles of equity long and well established, the specific performance sought by Lersner's bill should be denied; and I feel entire confidence that such will be the result, if the case be argued before and determined by the supreme judicial tribunal of the State. I anxiously desire a determination thereof by it, and

shall get ready to argue it before this high tribunal, unless I shall receive information, which I hope I shall not receive, that the judges decline having the case argued before them.

With sincere respect and esteem, I remain, very truly, yours,

CON. ROBINSON.

111 *Exhibit No. 2 with said petition.*

STAUNTON, *Aug't* 28, 1872.

MY DEAR SIR: I received last evening your letter of the 20th inst. We had much difficulty in determining how we ought to carry into effect, so far as we, the court of appeals, are concerned, the provisions of the act to provide a special court of appeals, approved Feb'y 28, 1872, (acts of assembly, 1871–'2, page 98,) especially in regard to the cases proper to be certified to such special court for trial by it. We at length concluded that the fairest and best mode was to certify to it the first fifty unargued causes standing on the docket at the time of our adjournment in Richmond last spring. We may have come to a wrong conclusion, but we acted according to the best of our judgment; nor would it be proper for us to attempt to undo what we have done, to take back any of the causes we have certified to the special court, and especially to take back causes which have been already argued before that court, and are now held by it under advisement. I believe that the special court will be able to decide those causes which have been argued much sooner than we, the supreme court, could now hear and decide them; so that nothing would be gained in the way of dispatch by our resuming them, even supposing that we could do so. We will probably postpone the commencement of our term in Richmond next fall to the middle or last of November, in consequence of our having to hold a session at Winchester some time in October. We will have, on our next meeting at Richmond next fall, to take up some privileged and set cases of great importance, which will occupy much time; so that we would not be able to take up any other cases sooner than December or January, which will be after the meeting of the special court in December.

Under all the circumstances, therefore, I respectfully suggest whether it will not be better not to lay your letter before my brother judges of the court of appeals. That is my opinion, with all deference to your better judgment; and I will await your answer before I do anything else in the matter.

Very truly and respectfully yours,

R. C. L. MONCURE.

CONWAY ROBINSON, Esq.

Exhibit No. 3 with said petition.

THE VINEYARD, NEAR WASHINGTON CITY,
Sept. 9, 1872.

To RICHARD C. MONCURE, Esq.,
President of the Supreme Court of Appeals, Virginia.

DEAR SIR: Your letter of the 28th of August has caused me
112 to reflect further on the duty that devolved on me in connection with the act of March 31, 1848, as well as on my present position. It seems to me that my proper part will be best performed by laying my views before the judges, so that they may act thereupon as they may deem right.

All must agree that the paramount duty is to support and maintain the constitution, as it is, according to its true intent and meaning. All may see that as to superior courts and the judges thereof, words which existed in the constitution as it was in 1848, (the judicial power shall be vested in the supreme court of appeals, in such superior courts as the legislature may from time to time ordain and establish, and the judges thereof, in the county courts, and in justices of the peace,) and which had great influence on two of the judges who sat in Sharp vs. Robertson, 5 Grat., 518, (See Baldwin J., 5 Grat., 603–618; and Allen J., 629. The latter, speaking of the special court of 1848, said: "The court falls within the class of superior courts which the legislature may from time to time ordain and establish, and assign to it such jurisdiction as the legislature may think proper." (See also pp. 631, 632, 633,) are not contained in the present constitution. It is very clear that under this constitution the only power that exists to form special courts is that contained in the 3d section of the 6th article, in construing which regard must be had to the maxim "expressis unius est exclusis alterius," and to the laws in relation to special courts of appeals which were passed before and on the 31st of March, 1848.

The question being as to the validity of the act of that date, Allen, J., said, (5 Grat. 641:) "The laws in relation to the special courts of appeals, in existence when the present constitution was adopted, furnish a precedent directly in point." Brooke, J., said, (pp. 642, 643:) "The question before us is whether the law constituting the five oldest judges of the circuit courts, a special court to decide the cases taken from the docket of this court without objection by any of the parties thereto, is constitutional. The necessity for this law arises from the cases being so numerous that great delay of the justice of the country has occurred. This delay is similar to that which occurred when there were not a sufficient number of judges, from some cause, who could sit in a particular case, and for the decision of which a special court constituted of the judges of this court who could sit in the case, and judges of the general court, was provided by the former law, and I think it is impossible to distinguish those special courts from this special court."

Now it is impossible to distinguish the special courts which had existed from the 19th of November, 1789, to the 31st of March, 1848, or the special court then constituted from the special court put into operation under the first section of the act of Feb. 28, 1872. So far from it, it appears that during that long period, from the 19th of Nov. 1789, to the 31st March, 1848, the court of appeals was never allowed to designate judges to constitute a special
113 court. Under the act of the 19th of Nov., 1789, ch. 18, § 9, pp. 25, 26, a summons issued to all of the judges other than those of the court of appeals, (13 Hen. Stat., pp. 25, 26.) So it was likewise under the revised act of Oct. 26, 1792, (ch. 11, § 6, p. 408,) and under the revised act of Jan'y 9, 1818, (1 R. C., 1819, p. 190, § 5,) and the act of March 1, 1819, (id., p. 195, ch. 65.) When it was thought there might be inconvenience from the attendance of too many judges and from having a court of more than five, the power of designating the particular judges who were to attend was given, not to the court of appeals, but to the general court, (Sess. Acts 1831–'2, ch. 47, p. 39; Sup. to Rev. Code, p. 123, ch. 95,) except in a cause wherein all the parties litigant consented thereto. (Sess. acts 1831–'2, ch. 47, p. 39; Sup. to Rev. Code, p. 125.) And by the act of 1848, though the legislature designated the judges of the special court, no case was placed upon its docket, where any party, by himself or his counsel objected thereto. Thus it clearly

appears that neither the act of the 31st of March, 1848, nor any acts previous thereto, as to a special court of appeals, furnish a precedent to support the first section of the act of Feb'y 28th, 1872. The large power conferred on the court of appeals by this section, of certifying to the special court causes "not exceeding fifty at a time," besides being without precedent, is open to serious objection on principle. You and your associates will concur with me in approving that wise rule of the common law which prevents a judge from acting where a certain benefit or disadvantage to him will be the consequence of his action. You will concur with me also in thinking that the smallness of such benefit or disadvantage may not always remove the objection to his acting; and that the objection may lie, though it may be supposed that the action of the judge could not be influenced by such benefit or disadvantage. In a famous cause before the House of Lords in 1852, Dimes v. Grand Junction Canal Co., (16 Eng. L. & Eq., 71,) Ld. Campbell, C. J., said: "No human being can suppose for an instant that my Lord Cottenham could be in the remotest degree influenced by the infinitesimally small interest that he had in this concern, nor if his interest had been ever so great; but, my lords, it is of the last importance that that maxim should be held sacred that no man is to be a judge in his own cause; and that it is not to be confined to a cause in which he is a party, but a cause in which he has an interest. He thought it would have a most salutary influence, when it is known that this high court of last resort, in a case in which the lord chancellor had an interest, considered that his decision was not according to law, and must be set aside." He added, "This will be a lesson to all those in the inferior tribunals to take care that in their decisions they may not be influenced by their personal interest, and to avoid the appearance of doing what is wrong." (Dimes vs. Grand Junction Canal Co., 16 Eng. L. and Eq., 81.) In the present instance there is no interest in the final result of a particular
114 cause. There is only that which is apparent on the face of the act of Feb. 28th, 1872, the power of certifying to a special court from time to time causes, not exceeding fifty at a time—the consequence to the judges of their certifying or not certifying; the benefit to them from the former, or the disadvantage to them from the latter. Yet the the minds of judges will naturally turn to the enquiry whether there may not be apprehension of a tendency to bias in action under the first section of that act, and whether it may not be advisable to guard against it.

It seems to me that the court of appeals should not have been the instrument to designate judges as provided in that first section; nor the instrument to certify causes to such extent as thereby provided; that it should have been left as the supreme judicial tribunal of the State, to pass on all questions that might arise as to the constitutionality of the act, or in anywise affect its operation, free from the bias that such instrumentality has a tendency to produce. If such a duty as I had in respect to the act of 1848 were now devolved on me in respect to the act of Feb. 28, 1872, it seems to me that in the faithful performance of that duty I would advise against such a provision as that in the first section of the last-mentioned act; and if it was already on the statute-book, would recommend a repeal or material alteration thereof. It may be worthy the serious consideration of the judges whether they should not make such a recommendation. An amicus præsidentis and amicus curiæ thinks this course may well be taken by judges anxious to support and maintain the constitution of the State, to uphold the supreme judicial tribunal thereof in its proper dignity, and to preserve it in the

way in which it ought to be preserved in order to be a blessing of great value.

If the judges should be of opinion so to recommend, then it would seem to follow that, until an opportunity for further legislation, there should be no further decisions by the special court; and meanwhile, in accordance with the principle of the second section of the act of March 15, 1832, as well as of the fifth section of the act of March 31, 1848, such of the fifty cases as remain depending should be resumed by the court of appeals, and be determined there as if those causes had never been certified to a special court.

But supposing that the judges should not be of opinion so to recommend, and conceding that in certifying the fifty cases which they did certify they acted according to their best judgment, it does not follow that what they did in those fifty cases was in every one of them right. Two centuries ago Vaughan, J., said: "We must not, upon supposition only, either admit judges deficient in their office, for so they should never do anything right; nor, on the other side, must we admit them unerring in their places, for so they should never do anything wrong." (Bushell's) Case, Vaughan 139.) This observation is as true now as when it was made.

Clearly the act of Feb. 28, 1872, would have violated the constitution if in so many words it had been enacted that the first fifty
115 cases on the docket of the supreme court which have not already been heard should not be heard by it, but should be heard by the special court. That which has been done must be equally a violation of the constitution, unless a difference be produced by the discretion that is conferred; yet the conferring this discretion can make no difference unless such discretion be exercised; and in the due exercise of such discretion, regard should be had to the fundamental principle that a party to a cause is not to be affected by judicial action therein without an opportunity of being heard. (6 Rob. Pract., tit. 5, pp. 625, 626.) Action to remove a cause from the supreme judicial tribunal of the State, composed of five judges, to an inferior tribunal, composed of three circuit judges, may materially affect a party to that cause, and should not be had without hearing what he has to object against it. Such action without such hearing (if there had been notice that on a certain day the first fifty cases would be called, and the counsel for a party to a cause might, on its being so called, state his objections to its being certified, then there might and would have been, in Lersner v. Bolling, a statement of such objections as might and probably would have been deemed by the court sufficient to prevent its being certified; but there was no opportunity of making such statement before the court's adjournment in April) may be treated like any other step in a case improvidently taken; like any other order improvidently made. Proceedings had pursuant to an order certifying to a special court a cause which ought not to be certified thereto may be regarded as of no more moment than proceedings had pursuant to an order directing an issue which ought not to be directed. The proceedings had pursuant to this order improvidently made in the one case are as immaterial as those had pursuant to the order improvidently made in the other case. (Wise vs. Lamb., 9 Grat., 308.) Nothwithstanding such proceedings in the case of Lersner v. Bolling, the supreme court may set aside the order certifying this case, and further order, if it see occasion therefor, that the special court from all further proceedings in the cause do altogether surcease. (Wyner vs. Wyatt's admr., 14 Leigh, 587.)

Such should now be the case in Lersner vs. Bolling, not only because

a party to the cause objects to its being tried by the special court, but also because the character of the cause makes it proper that it should be heard by the supreme court of appeals, even if it could be certified to the special court consistently with the constitution. In such a cause it is no sufficient answer to say (even if the fact were so) that the special court might be able to decide it somewhat sooner than the supreme court. It is enough, in a cause of such a character, that it may be decided by the supreme court without unreasonable delay.

But the objection that the cause could not be certified to the special court consistently with the constitution furnishes a further and
116 decisive reason for such action as the supreme court is now asked to take, for this objection cannot be determined by an inferior court, and unless obviated by an amendment of the act of Feb. 28, 1872, must be determined sooner or later by a tribunal higher than the special court.

According to my copy of the rules of the supreme court, its next session at Richmond is to commence on the first day of November. As to this no change seems to be required by the act of March 26, 1872, for hearing causes at Winchester, inasmuch as this act provides that "the same shall be heard within the period of time allotted for the holding of the court at Staunton. I hope that the next session at Richmond will commence on the first day of November, and that the judges of the supreme court, after due consideration of what is said in this communication, as well as in that of the 26th of August, will take such course as will enable Lersner and Bolling to be heard by the highest judicial tribunal of the State without any unreasonable delay.

With great respect and esteem, I remain, very truly, yours,

CON. ROBINSON.

Exhibit No. 4 with said petition.

STAUNTON, *Sept. 19th*, 1872.

MY DEAR SIR: I duly recd. your last letter, (of the 9th inst.,) and as soon as I could thereafter handed that and your preceding letter (of the 26th ulto.) to the other judges, to be read by them. All have read your letters, and we have just had a conference on the subject to determine what answer should be given to you, and I now proceed to inform you of the result.

A majority of the judges think it would be improper to express any opinion beforehand, and in this informal way, upon the subject referred to in your letters, and prefer that it should be presented to them, if you desire so do so, in some regular form during the session of the court, when all parties concerned can be heard by counsel, and when the court can decide the matter upon full argument and consideration. They are opposed to taking any action in the premises before their meeting at Richmond, such as is proposed in your letter of the 26th ult. The court here will probably adjourn on the 28th inst., or at all events will not sit longer than the 1st of October. It will sit in Winchester on the 15th of October, and probably continue in session there until after the 1st of November. Our next session in Richmond will commence on the 15th of that month. These matters were agreed upon by the judges in conference to-day.

I am, very truly, your friend,

R. C. L. MONCURE.

CON. ROBINSON, Esq.,
Near Washington, D. C.

117 *Exhibit No. 5 with said petition.*

THE VINEYARD, NEAR WASHINGTON CITY,
September 25, 1872.

To JAMES ALFRED JONES, Esq.

MY DEAR SIR: In addition to the copy heretofore transmitted to you of my communication of the 26th of August, 1872, to the president of the supreme court of appeals, I now enclose you copies of the following papers, to wit, of his communication to me of the 28th of August, mine to him of the 9th of September, and his to me of the 19th:

I should have been pleased if the judges, instead of acting under the act of Feb. 28, 1872, had taken such a course as their predecessors took in 1788. (4 Call, 141.) As the judges then in their memorial to the legislature expressed a hope that, "upon a revision of the subject," the law would be placed upon unexceptionable ground, and in the mean time deferred doing anything officially in execution of the act, and therefore declined to appoint clerks of the district courts, so it seemed to me that the judges in 1872 might, in a memorial, express a similar hope, and in the mean time defer doing anything officially in execution of the act of 1872, and therefore decline certifying cases under it. But as not this course, but one quite different, was taken in April, I am sensible of the embarrassment resulting therefrom. Advocating as I do the propriety of taking no step in a cause affecting a party without giving him an opportunity of being heard, it had seemed to me it might be well when the court of appeals meets again to have such of the fifty causes as remain depending called, and, as each one of them was called, learn whether any party to it objected to its being determined by the special court, and, if such objection was made, hear what might be said upon it by counsel on either side. But without some previous direction to the clerk, and previous intimation to adverse counsel, this course may not be taken; and therefore it may be proper to take some other.

I leave you to take such course as under the circumstances may seem to you advisable and proper. You can present the subject to the judges as soon as practicable after the commencement of the November term, in such form as you may be advised is regular. I suppose it will be de'med regular to make a motion in the particular case (Lersner vs. Bolling) to set aside so much of the order of April as certified that case to the special court, and give the adverse counsel reasonable notice of such motion. Possessed as you are of my views, you can make use of them in such way as you may deem best. At present I do not contemplate attending at the court-house until the time shall come for an argument of the cause before the supreme court of appeals upon its merits.

I remain, truly, yours,

CON. ROBINSON.

118 *Exhibit No. 6 with said petition.*

THE VINEYARD, NEAR WASHINGTON CITY,
November 19, 1872.

MY DEAR SIR: I have read with great interest the letter of the 11th from Mr. Bolling to you, enclosed in yours to me of the 17th.

You already know that from the time of my making a careful examination of the record in Lersner & Bolling, and the authorities pertinent to the case, I have had a decided opinion that according to well-established principles of equity the specific execution sought by Lersner's bill should be denied, and I have had and still have entire confidence that such would

be the result of an argument before the supreme court of appeals upon the merits of the case. So long ago as January, when you wrote me that an act of assembly for a special court was contemplated, I expressed the opinion that Lersner and Bolling ought to be tried by the supreme court, and when I received your letter of the 21st of April, telling me that it was one of the 50 cases assigned to the special court, I was deeply concerned. The opinion formed by me before the argument, that it was not a suitable case for a special court of 3 circuit judges, has remained unchanged during and since the argument. And when I wrote you on the 25th of Sept'r, my impression was in favor of your giving such notice and making such motion as I then suggested. But considering then and now that I have no right to control you in the matter, I left you then and leave you now to take such course as under the circumstances may seem to you advisable and proper. Although I place upon the supreme court of appeals as a judicial tribunal a much higher estimate than upon the special court constituted of only three circuit judges, and would feel much more confidence in the result of a measure by the former than by the latter upon the records, yet I am not disposed to press you to make a motion or an argument before the supreme court which you have reason to suppose it would not be agreeable to that court to hear.

In answer to the kind expression of your wish for a visit, I will merely say that my visits to Richmond during the next six months will probably be few and far between.

With my regards for Mrs. Jones,

I remain, truly yours,

CON. ROBINSON

Exhibit No. 8 with said petition.

To the judges special court of appeals:

I have heard with deep concern that two of the judges sitting in Lersner v. Bolling pronounced an opinion in favor of decreeing a
119 specific exec'tion of the contract of the 18th of Jan'y, 1863, and am pleased to learn that a petition for a rehearing has been presented by Mr. Jones and is supported by an argument of Col. Mosby, which has been printed and placed before the judges. I cannot suppose that the question as to specific execution will be closed without a rehearing in a case of great magnitude, involving important principles, and a subject of great value, wherein the four judges who have heard it are divided in opinion; Judge Thomas in the court below and Judge Barton in this court being against decreeing specific execution, though Judges Wingfield and McLaughlin are the other way. It is very desirable that these conflicting opinions should be passed upon by the supreme court of appeals, consisting of five judges. By none should this be more anxiously desired than by the judges who pronounced those opinions. Especially, as it seems to me, ought it to be desired by Judges Wingfield and McLaughlin, for it is a serious thing to take a large property from one man and give it to another; and all must admit that if Judge Thomas in the court below and Judge Barton in this court are right, then the property ought not to be taken from Robt. B. Bolling and given to Gustavus Lersner.

Under all the circumstances I respectfully suggest that this court should not only set aside the decree entered during the present term and grant a rehearing, but afterwards, in due time, transfer the cause to the supreme court of appeals, it appearing that power to make such transfer has been given by the act of the 17th of January, 1873.

After careful investigation of the subject, without any pecuniary interest to bias me, (having in the case no contingent fee, either large 'r small,) I have a thorough conviction that principles of equity long and well established require and demand that specific execution shall be in this case denied. Such, I believe, would be the conclusion of the supreme court of appeals after argument before that tribunal. For I am well satisfied that neither Hale v. Wilkenson nor any other case decided by that court will authorize a decree of specific execution under such circumstances as appear in the cause of Lersner and Bolling.

I remain, respectfully, yours,

CON. ROBINSON.

FEB'Y 13TH, 1873.

[* Filed with said petition for rehearing is a printed document, a copy of which is attached hereto.

CLERK.]

And in said circuit court, 20th December, 1873, this cause came on to be again heard on the papers formerly read, the report of Master Commissioner Shepperd, filed on the 28th day of November, 1873; 120 depositions of witnesses and exhibits returned therewith, and exceptions to said report taken by defendant, and was argued by counsel; on consideration whereof the court doth overrule the first, third, sixth, and seventh of said exceptions; and being of opinion, upon the matters contained in the fourth and fifth of said exceptions, that there is no error in the commissioner's report in failing to give the defendant credit directly for any increase in the intrinsic value of the lands, and that the true standard by which the rents and profits of the land should be determined is the annual value of said lands in the hands of a prudent and discreet tenant, upon a judicious system of husbandry, but being further of opinion that the mode of treatment by the occupant should have some influence in determining this value, and that the amount allowed by said commissioner is more than a fair rent under the circumstances, which the court ascertains, upon a fair view of the testimony, to be the sum of fifteen hundred dollars per annum, doth overrule said fourth and fifth exceptions in so far as they are inconsistent with the principles above declared, and doth sustain them in so far as consistent therewith. And the court, being of opinion, upon the 8th exception, that the defendant is entiled to the credit of $15.75 mentioned therein, and for the fencing, gates, repairs, and pump charged in Exhibit B, but not for grass-seed or plaster, doth sustain the said exception. And said report of Commissioner Shepperd is recommitted to him with instructions to reform the same according to the principles of his decree, and report the same forwith to the court.

And on the 23d of December, 1873, another report was filed in this cause in these words:

COMMISSIONER'S OFFICE,
Warrenton, Va., 22d December, 1873.

In obedience to a decree of your honor's court entered in the above-named cause on the 20th inst., your comm'r submits this report. The decree recommitted the former report of your comr. to be reformed according to the principles of said decree and to be returned forthwith to the court.

Your commissioner has made a statement of the account between the said Bolling and Lersner in exact accordance with the principles set out

in the said order. The premium necessary to raise the gold value of the amount paid to Caldwell & Shannon to the greenback currency was added, to wit, 37 per cent. The rent of the two farms was put, as directed, at $1,500, and from these rents was deducted every item found in paper 1 B that seemed to have been expended upon the permanent improvement of the farms.

The rent from the 2d of May last to the 20th of the present month, and from said amount was deduct' the taxes of the present year, which were ascertained by reference to the tax-book in the hands of the treasurer. The State and county tax upon these farms for this year is
121 exactly that charged for last year, but your comr. added 5 per cent. on the hundred-dollar valuation to cover township tax. There was also deducted the additional item of $3.00 for pipes.

It will be seen that the said Robert B. Bolling owes the said Gustavus Lersner the sum of $5,262.43 as of the 20th of December, 1873, of which amount $4,684.19 is principal.

Robert B. Bolling in account with Gustavus Lersner.

By the gold value of two drafts paid Caldwell & Shannon, £793 9*s.* 7*d.*, @ $4.84 to the £		$3,840 43	
Amt. of 37 per cent. premium		1,420 95	
			$5,261 38
Int. on $5,261.38 from 3d June, 1865, to 2d May, 1866			289 37
			$5,550 65
Deduct value of household and kitchen furniture, as per depositions of Addison B. Carter and Nathan Loughboro'		$2,750 00	
And value of old mule		10 00	
			2,760 00
			2,790 65
Int. on $2,790.65 for one year			167 43
			2,958 08
Deduct value of rents for 1866-'7		$1,500 00	
Less amt. paid extra hands cutting rails	$27 00		
Less amt. paid on pump and plumbing	5 55		
Less amt. paid taxes	108 75		
		141 30	
			1,358 70
			1,599 38
Int. on $1,599.38 for one year			95 96
			1,695 34
Deduct rents for 1867-'8		$1,500 00	
Less taxes paid for 1867		210 09	
			1,289 91
			$405 43

Int. on $405.43 for one year				24 32	
				$429 75	
122 Deduct rents for 1868–'9			$1,500 00		
Less amt. paid for fixing pump		$5 00			
Less amt. paid for ditching		236 80			
Less amt. paid for stone fencing		93 28			
Less amt. paid for taxes		209 99			
			545 02		
				954 93	
Amount due Gustavus Lersner				$525 18	
Int. on $525.18 from 2d May, 1869, to 20th Dec. 1873				145 99	$671 17
Amt. of rent for the year 1869–'70			$1,500 00		
Less amt. paid Holmes repairing gutter		$21 10			
Less amt. paid Higgins for plumbing		15 70			
Less amt. paid Higgins for ditching		470 00			
Less amt. paid Higgins for fencing		15 75			
Less amt. paid Higgins for taxes		299 52			
			742 07		
				757 93	
Int. on $757.93 from 2d May, 1870, to 20 Dec., 1873				165 22	
					$923 15
Amt. of rent for the year 1870–'71				$1,500 00	
Less cash paid Brown for making gates			$4 00		
" " " for repairing "			9 25		
" " " freight on lumber			5 75		
" " " ditching, and board of ditchers			287 00		
Less cash paid taxes			363 60		
				669 60	
				830 40	
Int. on $830.40 from 2d May, 1871, to 20th Dec., 1873				131 20	
					$961 60
Amt. of rents for year 1871–'2			$1,500 00		
Less cash pd. stone fenc'g		130 00			
" " taxes		328 00			
" for 250 ft. plank		5 18			
			463 18		
				$1,036 82	
Int. on $1,036.82 from 2d May, 1872, to 20th Dec'r, 1873				101 60	
					$1,138 42

123	Amt. of rent for the year 1872–'3		$1,500		
	Less cash paid for freight on lumber	2 20			
	Less cash paid for blinds, &c.	27 50			
	Less cash paid for lumber	22 99			
	Less cash paid for plumbing, pump, &c	256 81			
	Less cash paid for taxes	289 65			
			599 15		
				900 85	
	Int. on $900.85 from 2d May, 1873, to 20 Dec., 1873.			34 23	
					$935 08
	Amt. of rents from 2d May, 1873, to 20 Dec'r, 1873		950 00		
	Less taxes for the year 1873, per tax-book	313 99			
	Less repairs for pipes	3 00			
			316 99		
				633 01	$633 01
	Total amt. due Gustavus Lersner by Robert B. Bolling, as of 20th Dec'r, 1873, of which $4,684.19 is principal				$5,262 43

All of which is respectfully submitted by—

H. SHEPPERD,
Com'r in Ch'y.

To Judge JAMES KEITH,
Fauquier Circuit Court.

And on same day, to wit, 23d December, 1873, the defendant filed exceptions in these words:

Exceptions of Robert B. Bolling to the report of Commissioner Shepperd, returned in the case of Lersner vs. Bolling, returned day of December, 1873.

1. Because the commissioner charges the defendant with estimated and conjectural rents, &c., instead of the actual profits realized by deft.

2. Because the com'r has failed to give Bolling credit for the increased value of the land, arising from the mode in which he managed it.

3. Because the rent fixed is in excess of any fair estimate of value of the estate, based upon a proper management of it.

4. Because interest has been allowed upon estimated rents.

7. Because the commissioner has not reduced the charge for
124 the rent of 1866–'7 below that of other years, although that was the year when the fencing had to be repaired and there was no capital to buy stock, and the tenancy began and ended at an unreasonable period for farming operations, to wit, the 2d of May, 1866, to 2d May, 1867.

8. Because the com'r failed to allow Bolling sufficient credit for his improvements and repairs over and above the general improvement of the land. (See exception 8 of 17th of December, 1873.)

ROBERT B. BOLLING,
By his counsel, W. H. PAYNE AND
JNO. S. MOSBY.

And in said court, 23d December, 1873:

The plaintiff this day filed his bond in the penalty of $2,500, payable to the Commonwealth of Virginia, and conditioned as required by the decree of the special court of appeals of Virginia on the 27th January, 1873, and with sureties who have justified to their sufficiency, and are deemed adequate to the court. And this cause coming on to be further heard on the papers formerly read, the report of Comm'r Shepperd, made pursuant to the decree of the 20th day of December, 1873, and exceptions thereto, filed by the defendant, and was argued by counsel; on consideration whereof the court, overruling the said exceptions and confirming the said report, doth adjudge, order, and decree that the defendant, Robt. B. Bolling, do execute and deliver to the plaintiff, his heirs or assigns, a good and sufficient deed, in fee simple, with general warranty, conveying to said plaintiff, his heirs or assigns, that tract or parcel of land known as Bollingbrook, in the bill and proceedings mentioned; and doth further adjudge, order, and decree that the plaintiff recover against the defendant the sum of five thousand two hundred and sixty-two dollars and forty-three cents, with interest on $4,684.19, part thereof from the 20th December, 1873, and the costs by him expended in the prosecution of this suit; and leave is reserved to said plaintiff to apply for further relief upon the footing of this decree.

And at the instance of the defendant, who desires to apply for a writ of supersedeas in this cause, the operation of this decree is suspended for sixty days from the date of the same.

From the record.

Copy teste:

JNO. S. BYRNE, *Clerk.*

Clerk's fee for this record, $60.00.

JNO. S. BYRNE, *Clk.*

125 *Letter from Conway Robinson, Esq., to Clerk of Court of Appeals, pointing out and explaining certain defects in record.*

THE VINEYARD, NEAR WASHINGTON CITY,
May 14, 1874.

To the clerk of the supreme court of appeals of Virginia:

DEAR SIR: In Bolling v. Lersner, when I was examining the transcript from Fauquier and preparing petition for an appeal, I observed that in copying documents which accompanied the petition for rehearing, matter which in the original was at the bottom of a page, and in the form of a note, was by the clerk of Fauquier introduced in the body of a document and formed part of a long and awkward sentence; and I immediately wrote about it to counsel in the court below that he might mention it to the clerk of Fauquier, and that such step should be taken to remedy the defect as might seem best. On looking at one of your printed copies of the transcript, I notice the following instances of such defect:

In letter of August 26, 1872, (p. 107), after the word "associate," was a note embracing the words "In a letter of the 21st of April, 1872, Mr. Jones says," and embracing the words which then follow immediately without inverted commas.

The whole of the paragraph in a parenthesis, (p. 110), commencing with the words "though mindful," and ending with the words "three circuit judges," was in a note.

On the same page, (110,) in a parenthesis, are the words "I say this without any bias from a contingent fee, large or small; I am not to gain or lose by the result of the cause." These words were in a note.

On page 112, in a letter of September 9, 1872, are two (the two first) parentheses, the matter of each of which was in a note.

Again, on page 115 is another parenthesis, the matter of which was in a note.

You may have this communication printed at the end of the record.

Respectfully yours,

CON. ROBINSON.

126 In the circuit court of Fauquier County, Virginia.

GUSTAVUS LERSNER, PLAINTIFF,
against
ROBERT B. BOLLING, DEFENDANT. } In chancery.

The defendant insists that this court should not enter, as its own, the decision produced as the decree of the special court of appeals, and that thereupon no execution should issue, nor any proceedings be had to carry the same into effect; for this defendant insists that the said decision is null and void on the following grounds:

GROUNDS OF OBJECTION.

I. That from the decree made by this court on the 13th of September, 1867, there has been no appeal according to the laws of this State; that the only appeal therefrom was awarded by one W. Willoughby, who never had any valid commission or appointment as judge, but entered upon the office under color of certain acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, commonly called the reconstruction acts, and of an appointment by the general exercising military authority under the second section of the said act of the 19th of July, 1867; that the said acts were, each and all of them, passed, not according to the first section of the first article of the Constitution of the United States in the exercise of powers therein granted, and were not necessary or proper for carrying into execution those powers, or any power vested by the Constitution in the Government of the United States, or in any department or officer thereof, but are plainly repugnant to the fourth section of the fourth article of said Con-
127 stitution, which requires that "the United States shall guarantee to every State in the Union a republican form of government;" and to the fifth article of the amendments to said Constitution, which provides that no person shall "be deprived of life, liberty, or property, without due process of law;" and to the tenth article of said amendments, whereby "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is now insisted that, according to the true construction of the e clauses of the Constitution, the said acts of Congress are not any of them laws made in pursuance of said Constitution, but that each of them is invalid, and that the authority exercised under the United States by force of said acts is also invalid; and insisting on the title, right, and privilege conferred or recognized by these clauses of the Constitution, this defendant claims exemption under said clauses from the order of said W. Willoughby allowing the appeal.

II. That the said appeal was not heard by the supreme court of appeals, but the trial thereof was by judges sitting as a special court of appeals under color of an act of assembly of Virginia, passed on the 28th of February, 1872; and the said act is in violation of the present constitution of this State, which contemplated that in every special court of appeals there should be the same number of judges required by the act of March 31, 1848, (Sess. Acts, p. 51,) and by the constitution of 1851, art. vi, § 12, and by the act of February 25, 1854, passed in pursuance thereof, (Sess. Acts, p. 18,) the language of the constitution of 1851, as to the number of judges, being the same as in the present constitution; and the true intent and meaning of each instrument being that whenever a special court of appeals was formed, it should be formed of a sufficient number to enable five, and no more than five, judges to sit therein, and that not less than three should sit to do business.

III. As to the designation of judges of the special court of appeals, the intent of the constitution was not that it should be by the supreme court of appeals, but that it should be in a way analogous to that prescribed by the act of March 31, 1848, (Sess. Acts, p. 51,) or that of February 25, 1854, (Sess. Acts, p. 18.)

IV. As to cases on the docket "which cannot be otherwise disposed of with convenient dispatch," the intent of the constitution was not that the same should be ascertained by the supreme court of appeals, but that the ascertainment thereof should be in the way prescribed by said act of March 31, 1848, or February 21, 1854, or in some way analogous thereto.

V. This particular case should not have been certified to the special court of appeals; for it could have been disposed of by the supreme court of appeals with convenient dispatch. The character of the
128 case, involving a subject of great value and principles of great importance, rendered it material that it should be heard by the supreme judicial tribunal of the State. A special court of appeals for which five judges had not been designated could not pass upon the constitutionality of a law; for the 2d section of the 6th article of the constitution, after providing that "the supreme court of appeals shall consist of five judges, any three of whom may hold a court," expressly declares "the assent of a majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the Federal Constitution, or to the constitution of this State.

VI. This case should not have been certified to the special court of appeals, without giving to the defendant, or his counsel, an opportunity of making such objection thereto as was allowed by the act of 1847–'48, (ch. 68, § 4, p. 51,) and the act of 1853–'54, (p. 18, ch. 17, § 1, 2.) Action to remove his cause from the supreme judicial tribunal of the State, composed of five judges, to an inferior tribunal, composed of three circuit judges, was a most important step, and should not be allowed to affect him when that step was taken without giving him an opportunity of being heard in regard to it.

VII. Under such circumstances, to give effect to the opinion of the two circuit judges constituting the majority of the special court of appeals, in opposition to the opinion of another judge of that court, as well as to the opinion of the judge who made the decree of the 13th of September, 1867, would deprive this defendant of his property without due process of law, contrary to the 14th amendment of the Constitution of the United States.

ARGUMENT.

While Richard C. L. Moncure, William T. Joynes, and Alexander Rives were acting as judges of the supreme court of appeals, under the constitution and laws of the State, there was no appeal from the decree of the circuit court; the greater part of the two years allowed for the appeal had elapsed; there remained of the twenty-four months less than four, when an appeal was awarded by one of three military appointees. Then, after Richard C. L. Moncure, William T. Joynes, Joseph Christian, Waller R. Staples, and Francis T. Anderson became judges
129 of the supreme court of appeals, no desire was shown by the plaintiff to bring his case before them. Eagerness to bring it on was only manifested after the act of February 28, 1872, "to provide a special court of appeals," and the transfer that followed. If the appeal was awarded by one who had no lawful jurisdiction to award it, then upon that appeal there could be no valid decree of reversal. Whether there was jurisdiction to award the appeal or not, yet if those who made the decree of reversal had no jurisdiction to make it, that decree is void.

"A recurrence to fundamental principles" will show that that so-called decree is void on both grounds.

According to the common law of England, that common law which is our birth-right, judicial power distributed to courts of justice or judges thereof, is to be exercised only by those who, when they enter upon the discharge of judicial duty, and begin to exercise judicial power, have a commission which is warranted by precedents and on its face appears to be valid; and they must not transcend the authority conferred by such commission.[1] Centuries ago, when one had a judgment reversed before the council of State, the reversal "was held utterly void, for that it was not a place where judgment may be reversed."[2] A subsequent case, in 13 Elizabeth,[3] has been recognized by the soundest jurists in succeeding ages; by Coke[4] and Hawkins and Blackstone. Mr. Sergeant Hawkins, and Sir William Blackstone, both lay down
"that any judgment whatsoever given by persons who had no
130 good commission to proceed against the person condemned, may be falsified by showing the special matter without writ of error, because it is void." Hawkins illustrates this position by saying, "As where the commission authorizes to proceed on an indictment taken before A, B, C, and twelve others, and by color thereof, the commissioners proceed on an indictment taken before eight persons only."[5] Blackstone's illustration is thus: "As where a commission issues to A and B and twelve others, or any two of them, of which A or B shall be one to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A or B, in this case, all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon due inspection, without the trouble of a writ of error, it being a high misdemeanor in the judges so proceeding, and little (if anything) short of murder in them all, in case the person so attainted be executed and suffer death."[6]

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[1] 2 Inst., 103; 4 id., 70; Jentleman's case, 6 Rep., 11 *b*; Dowman's case, 9 id., 13 *a*; 2 Hawk. P., C. ch. 5, § 2, clause 2, p. 19.

[2] 39 E. 3 is cited in 5 Jac., 1, in the memorable case of Prohibitions del Roi, 12 Rep., 64.

[3] Earl of Leicester v. Heydon, Plowden, 384, cited in 8 Jac., in 1 Bulst., 105.

[4] 3 Inst., 231.

[5] Book 2, ch. 50, § 3, p. 651.

[6] 4 Bl., ch. 30, p. 390; 1 Chit. Crim. Law, 744.

To a document as old as 4 Elizabeth, and introduced collaterally, though it was from the decree-book of the court of exchequer, and produced as its decree, it was more than two centuries afterwards a valid objection; that it was a mere entry of something done by persons, some of whom were not judges thereof. In delivering the judgment of the king's bench, Lord Tenterden, C. J., (in 1831,) said: "One cannot read the names that appear here without seeing that the decree was not that of the court of exchequer nor of any court of justice known at that time. The judges consisted of some persons who were members of the court of exchequer joined with others who were not—Her Majesty's attorney and
131 solicitor-general and the queen's sergeant appearing in a judicial character. It was evidently, therefore, a proceeding before persons not forming any court known to the laws of this country, nor having any competent authority to decree the matter in issue, or to make the decree which they made."[1]

In the language of Marshal, C. J., delivering the opinion of the Supreme Court of the United States, "a sentence professing on its face to be the sentence of a judicial tribunal, if entered by a self-constituted body or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever."[2]

This doctrine is supported by the bill of rights of Virginia, the 15th article whereof was pronounced by the judges of this State, in 1788, "worthy to be written in letters of gold." To that article they had recourse, then, in forming their judgment as to "the supremacy of the constitution," and as to its "prescribing limits to the powers of the legislature as well as to those of the other departments of government."[3] Thenceforth it was regarded as a fundamental principle that the constitution being the supreme law, an act of the legislature is subordinate thereto, and, so far as it conflicts therewith, is void.[4] It is a necessary consequence that a commission or appointment under such an act (conflicting with the constitution) is void, and that acts done by a person having no other authority than such void commission or appoint-
132 ment are invalid, for, as was said in 1820 by the court of appeals of Kentucky, the constitution is an "instrument that every officer of Government is bound to know and preserve at his peril, whether his office be judicial or ministerial, and he cannot justify an act against its provisions, even with the authority of the legislature to aid him."[5] That court judicially declared in 1829 that although men may have assumed the functions of judges, and acted as such, yet "their acts in that character are totally null and void unless they had been regularly appointed under and according to the Constitution."[6]

Nor are any of the legislative acts now in question to be justified because of the period of the enactment thereof.

1. As to the acts under color of which W. Willoughby acted:

The supreme judicial tribunal of this country has said that "the Constitution of the United States is a law for rulers and people equally in

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[1] In answer to the argument that the document might be received as an award, Lord Tenterdon said, "An award must be founded on a voluntary submission," whereas here parties "were called before the persons who made the decree, by an authority which, at that time of day, they might not think it convenient to resist." (Rogers, &c., v. Wood, 2 Barn. & Adol., 245, 22 Eng. C. L.)

[2] Rose v. Himely, 4 Cranch, 268.

[3] Case of the Judges, 4 Call, 142.

[4] 1 Kent's Com., 422 to 454.

[5] Ely v. Thompson, &c., 3 A. K., Mar. '75.

[6] Hildreth's heirs v. McIntire's devisee, 1 J. J. Mar., 206; Rodman v. Harcourt, &c., 4 B. Monroe, 230.

war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."[1]

If such acts as those passed by Congress in 1867 could have been justified while war continued,[2] that justification did not exist at the period of their enactment. For before that period the war was
133 ended and peace restored.[3] The President's proclamation of the 2d of April, 1866, declared that armed resistance had ceased everywhere except in the State of Texas. On the 20th of August, 1866, he proclaimed that it had ceased there also, and that peace, order, and tranquillity existed throughout the whole United States. In conformity with the proclamation of the President, the same day, (August 20, 1866,) was adopted by Congress,[4] and the Supreme Court.[5] So that the acts of Congress now in question were passed after every Department of the Government of the United States, executive, legislative, and judicial, had proclaimed or recognized that war was at an end, and that peace, order, and tranquillity, existed throughout the United States. Moreover, the President of the United States, on the 25th of December, 1868, issued a proclamation of universal amnesty and pardon, "with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof,[6] and (as the Supreme Court of the United States has said) this proclamation "was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect."[7]

If before the fourth day of March, 1861, any individual had said and endeavored by argument to maintain that the time was coming
134 when judges of the supreme court of appeals of Virginia would in time of peace be appointed not according to the constitution and laws of the State, but by act of Congress of the United States or by the President under such an act or by a commanding general, many, perhaps most sane persons (having knowledge of the Constitution which Senators and Representatives in Congress are bound by oath to support, and which the President has solemnly sworn that he will, to the best of his ability, preserve, protect, and defend,) would have pronounced such an individual a fit subject for a lunatic asylum. Yet such, and no other, was the appointment of W. Willoughby. It was in time not of war but of peace, and after the proclamations, both of the 20th of August, 1866, and 25th of December, 1868, before mentioned, that under color of the 2d section of the act of Congress of the 19th of July, 1867, the general exercising military authority did an act purporting to be an appointment of W. Willoughby as judge, and the said W. Willoughby, under

[1] Ex parte Milligan, 4 Wallace, 120, cited in 6 Rob. Pract. tit. 5, p. 622

[2] Jenk 131, case 66; Hale's P. C, 60; 1 Bl. Com., 370; Woodson v. Members of the Council and the Sergeant of Harrisonbury, cited in 20 Grat., 48.

[3] See the President's proclamations of June 13, 1865, in 13 Stat., 763; that of April 2, 1866, in 14 Stat., p. 811, and after the order of May 1, 1866, in McPherson's Manual, p. 17, the proclamation of August 20, 1866, in 14 Stat., 814.

[4] The rate of pay to non-commissioned officers and privates that was fixed by the act of June 20, 1864, in 13 Stat., p. 144, was by the act of March 22, 1867, continued "for three years from and after the close of the rebellion, as announced by the President of the United States by proclamation, bearing date 20th August, 1866." 14 Stat., p. 222.

[5] At Dec'r term, 1869, the Supreme Court said: "As Congress, in its legislation for the Army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it." United States v. Anderson, 9 Wallace, 71. See also the Protector, 12 id., 700.

[6] 15 Stat., 711.

[7] Armstrong v. United States, 13 Wallace, 155.

color of that appointment, and without any other authority, awarded the appeal now in question.

Such an interference with the judicial department of the government of the State was a plain and palpable violation of the constitution. In the Supreme Court of the United States, at December term, 1868, in one case there was nothing requiring the court "to pronounce judgment upon the constitutionality of any particular provision of" the so-called reconstruction acts; but the court deemed it "important to observe that these acts themselves show that the governments which had been established and had been in actual operation under executive direction was recognized by Congress as provisional, as existing, and as capable of continuance."[1] In another case it was understood that the
135 Supreme Court would have adjudged these acts unconstitutional and void to the extent involved therein, but for the fact that jurisdiction of the particular appeal was derived from the act of February 5th, 1867,[2] and this act was repealed by an act of March 27th, 1868.[3] However, the last act did not affect the jurisdiction that existed before Feb., 1867, and therefore jurisdiction was exercised to such extent as was found necessary in Yerger's case, (8 Wallace, 85.)

The doctrine of 1789, that "the States retain all pre-existing authorities which may not be exclusively delegated to the Federal head," and that this "principle applies with the same force to the judiciary as to the legislative power,"[4] is still maintained. So recently as December term, 1870, the Supreme Court recognized the "familiar rule of the construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the Government of the United States;" and citing the 10th article of the amendments, said "the Government of the United States therefore can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." "The States within the limits of their powers not granted, or in the language of the 10th amendment 'reserved,' are as independent of the General Government as that Government within its sphere is independent of these States." "The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence." "The means and instrumentali-
136 ties employed for carrying on the operations of their governments for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired." "And more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department and the appointment of officers to administer their laws. Without this power and the exercise of it" the Supreme Court thought it would "risk nothing in saying that no one of the States, under the form of government guaranteed by the Constitution, could long preserve its existence. A despotic government might." Having said that one of the powers was to establish a judicial department, the court add, "it would have been more accurate and in accordance with the existing state of things at the time to have said the power to maintain a judicial department. All of the thirteen

[1] Texas v. White, 7 Wallace, 731.
[2] 14 Stat., 385.
[3] 15 Stat., 44; McCardle's case, 7 Wallace, 506.
[4] Federalist, vol. 2, pp. 323 and 324, cited in 4 Dall. App., p. xxxi: People v. Godfrey, 17 Johns, 232.

States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the General Government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the General Government as that Government is independent of the States."[1]

Consistently with this decision in 11 Wallace, it is impossible to maintain the validity of the acts of Congress now in question. Virginia adopted one constitution on the 29th of June, 1776,[2] and another in 1830. Each of these instruments was the work of statesmen
137 abler and greater than are to be found at this day in the legislature of any State in the Union or in the Congress of the U. States. To some extent, though not to so great an extent as was desirable, their good work was preserved in the Constitution of 1851, which from the time of its adoption was the form of government of Virginia until it was overthrown by the war-power of the United States. Now, whatever may be thought in Virginia of that little convention which, in 1861, assumed to re-organize the State and form for it what was known as the Pierpoint government, yet it is not for any Department of the Government of the United States to say that that was not a legal State government. For this organization was recognized as the State of Virginia by the President and Congress, and afterwards by the Supreme Court at the very same term at which it made the decision in 11 Wallace, just mentioned,[3] and under this organization so recognized by the President, by Congress, and by the Supreme Court, Richard C. L. Moncure, William T. Joynes, and Alexander Rives became judges of the supreme court of appeals of the State, and remained in office until the usurpation perpetrated in the spring of 1869, under color of the second section of the said act of Congress of the 19th of July, 1867. The government of the State then existing under that organization so recognized by each Department of the Government of the United States, never empowered W. Willoughby to take the place of any of the judges appointed under said organization, or to make an order awarding the appeal in question.

His power is of necessity examinable by that tribunal which is called on to decide as to the effect of what has been done in consequence of his exercise of that power. And it being clear that he was
138 not empowered by the civil government of the State to take cognizance of the subject to which his order applies, it is a necessary consequence that his order can have no legal effect whatever.[4]

This consequence cannot be avoided by any proper application of the doctrine as to one having a reputed authority, but not in office de jure;[5] for W. Willoughby knew, or was bound to know—and others knew or were bound to know—the provisions of the Constitution, and that under those provisions, the appointment by military power of him as judge of a civil court was illegal and void. It was unlike the case where the commission, at the time it emanated, was legal and conferred lawful authority, and under it the commissioners acted before notice of the event

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[1] Collector v. Day, 11 Wallace, 124 to 126.

[2] "The first written constitution of a sovereign State among men.—Grigsby's discourse on Virginia Convention of 1776, pp. 19, 20, and 165, 166.

[3] Virginia v. West Virginia, 11 Wallace, 56.

[4] Marshall, C. J., in Rose v. Himely, 4 Cranch, 269.

[5] 22 Eliz., Knowles v. Luce, Moore, 112, recognized in Parker v. Kett, 1 Ld. Raym., 661; 38 and 39 Eliz., Leak v. Howel, Cro. Eliz., 533; 41 and 42 Eliz., Harris v. Jays, id., 699; 17 Jac., 1, O'Brien v. Kivan, Cro. Jac., 554.

which terminated their authority.[1] After 6 W. & M.,[2] to wit, in
139 11 Geo., 2, it was found "that G. was never elected mayor, or ever had lawful right or title to the office; but that under color of being elected, he was in fact presented and sworn at a court leet, and acted all the year." G. was "taken to have been a mere usurper,"[3] the court saying, "though it be stated that he was sworn at the leet, it does not appear, as it ought, that this was agreeable to the constitution of the borough."[4]

Other cases concur[5] in holding an act not to be valid as the act of a de-facto officer unless he came into office under "color of a legal appointment or election to that office;"[6] "under color of an election or appointment by the only body which has the power to make it."[7]

There is a plain distinction between an officer who never had a valid commission or appointment[8] and one who entered on the discharge of official duty under a commission or appointment appearing to be valid on its face, and in respect to whom there is an allegation of
140 something that is not so apparent,[9] as in the case before the king's

[1] In 3 Car., 1, under a commission from the court of Chester, which was awarded in Hill T., 22 Jac., 1, returnable to E. T. following, the commissioners began the examination of witnesses upon the 28th March, 1625, which was the day after the demise of King James, and continued the examination until Friday following, at which day, and not before, having notice of the demise of the King, they surceased. Although legally the commission was determined by the demise of the King, yet the commissioners not having notice thereof, and having examined, it was "held that such witnesses were duly sworn, and should be allowed, especially in a court of equity where the proceedings be jure naturale, and not according to the strict course of law;" the lord keeper and justices saying there had been "many trials by verdicts of nisi prius, and trials and attainders upon jail-deliveries, whereupon divers have been arraigned and executed since the King's demise, and before notice thereof." But they approved of the course which had been adopted, "that the witnesses should be called, and their former examinations and interrogatories tendered to such of them as were alive, and to enquire whether they approve of them." Crew v. Vernon, Cro. Car., 97.

[2] In 6 W. & M. the action was on a bond of "the mayor, masters, and burgesses of Wells." A special verdict found "that one D. was elected mayor, who put the seal of the corporation to the said bond." It was held "the bond was good; for, admitting that he was not qualified to be mayor, yet he came in to be mayor by color of an election, and was mayor de facto by means of that election. Knight and wife v. Corpo. of Wells, 1 Lutw., 508.

[3] Rex v. Lisle, 2 Str., 1090: "For, in order to constitute a mayor de facto, it is necessary that there should be some form or color of an election; but without this, the taking the title and regalia of the office, and the acting and being sworn in as mayor, are not sufficient." S. C. Andr., 172, recognized in the People v. Collins, 7 Johns., 554.

[4] And Lee, C. J., cited the Queen and Davis, in Queen Anne's time, where "it was held that there cannot be an officer de facto and an officer de jure at the same time." S. C. Andr., 173. Accord. Rex v. Mayor of Colchester, 2 T. R., 259.

[5] In 1805, G., who had been deputy of C., the registrar, was not, in acting as registrar after C.'s death, considered as an officer de facto, and therefore his acts did not give effect to conveyances registered by him during that period. Rex v. Corpo. of Bedford Level, 6 East, 368, cited in Plymouth v. Painter, 17 Conn., 588. In 1813, where the question was as to the appointment of Dr. P. as a surrogate, though he had acted from 1743 to 1812, Lord Ellenborough would not shut out evidence that the appointment was not duly made. He thought he must judge of the manner in which it took place by the entry which records it." The appointment appearing to be "contrary to the canon," was treated by him "as a nullity." Rex v. Verelst, 3 Camp., 435. This case is distinguished from Wilcox v. Smith, 5 Wend., 234, but is supported by the People v. Tracy, 9 id., 265.

[6] Walworth, Ch., in the People v. White, 24 Wend., 539.

[7] Hinman, J., in Douglass v. Wickwire, 19 Conn., 492.

[8] Hartley v. Cooke, 9 Bingh., 735, 23 Eng. C. L.

[9] In New York, in 1811, the commissioners of highways had been duly elected; the objection was merely that they had not caused a certificate of their oath of office to be filed in the clerk's office. (People v. Collins, 7 Johns, 554.) In 1812 it was in vain to allege that the justice before whom the verdict was rendered was a minister of the gospel, when this fact did not appear on the face of the appointment. Indeed it was denied and in no way proved.

bench, in 1819, wherein a commission to certain persons, constituting them justices, having issued under the act of Parliament of 51 Geo., ch. 36, which provided expressly that from and after such commission shall, have so issued, every person named in such commission shall be, and is "hereby declared to be," a justice, a warrant issued by such person as a justice was objected to, but objected to in vain, because he had omitted as required by section 3, to deliver in a certificate of his having taken the oaths required. Had the warrant been invalid on this ground, it was admitted by Abbott, C. J., that "all persons who act in the execution
141 of the warrant, will act without any authority; a constable who arrests, and a jailor who receives a felon, will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable or persons aiding him in some possible instance become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant." The court avoided such consequences by the construction which it placed on the words of the act of Parliament. It said that by this act "Mr. D. having been named in the commission, is declared to be a justice and invested with power and authority as such; that the restraining clause in sec. 3 is only prohibitory upon him; that its effect "is only to make it unlawful in him to act as such, but not to make his acts invalid;" and that his acting contrary thereto would subject him to a prosecution.[1] Other cases agree in the same position, that where there has been in fact an election apparently valid, and it is claimed to be a nullity, because of "extraneous matter," this, though ground for a proceeding to obtain a new election, does not render invalid acts of the persons so elected, which may have been done previously to such proceeding, (to obtain a new election.[2])

(McIntyre v. Tanner, 9 id., 135.) Following U. S. v. Batchelder, (2, Gall, 15,) the decision in New Hampshire, in 1818, goes merely to show that the acts of an inspector of the revenue acting under those "who have the legal right to appoint," are valid when coming in question incidentally, although there may have been an omission to comply with some provision of the act of Congress, which was "merely directory, and not essential to the legal validity of the official acts of the person actually appointed. (Jones v. Gibson, 1 N. Hamp., 267.) No more than that, if so much, is shown by Gilmore v. Holt, &c., (4 Pick., 261.) In Vermont in 1827, the objection was not as to the appointment of the constable, but merely to the want of record evidence to show that he was sworn: the officer being duly appointed a constable and having acted as such, was presumed to have taken the regular oaths. (Adams v. Jackson, 2 Aik., 145.) In New Hampshire, in 1834, the person collecting taxes had been chosen collector at a meeting of the town regularly holden in every respect, except that the moderator was not sworn. (Tucker v. Aiken, &c., 7 N. Hamp., 140.) In Vermont, in 1842, a person was treated as de facto a justice of the peace, although there might be ground for a proceeding to vacate it, inasmuch as he was alleged to hold an office of profit or trust, under the authority of Congress. (McGregor v. Balch, 14 Verm., 434.) In New Jersey, in 1854, the objection was merely that the members of the common council which ordered the tax, and the assessor and collector were not duly sworn. (State v. Perkins, 4 Zabriskie, 410.) There was a regular election in Virginia in 1859. (Monteith v. Com., 15 Grat., 179;) and a regular commission in Maine, in 1861. (Hooper v. Goodwin, 48 Maine, 80.)

[1] Margate Pier Co. v. Hannam, 3 Barn. & Ald., 266, 5 Eng. C. L.

[2] Reg v. Vestrymen of St. Pancras, 4 Per. & Dav., 66; 11 Adol. & El., 15, 39, Eng. C. L. When this case is referred to for the facts constituting the illegality alleged in Lorant v. Scadder, (13 Adol. & El., N. S., 692, 66 Eng. C. L.,) it will be found that nothing more than is mentioned in the text was decided in the latter case by the exchequer chamber in 1849, (8. C., 13 Adol. & El., N. S., 712,) or the House of Lords in 1851, (8. C. 3 Ho. of L., 418, 4 Eng. L. & Eq., 16.) Section 5 of the statute of 5 and 6 Edw. 6, c. 16, (against buying and selling of offices,) is on the same principle; and the section of the code of Virginia which is cited in 20 Grat., 47, was taken from that statute and extends no farther. (1 R. C., 1792, ch. 60, section 5, p. 53 of 1st, p. 80 of 2d edi.; 1 R. C., 1819, p. 560, ch. 145, § 5; Report of Revisors, (of code of 1849,) ch. 12, section 9, p. 50; code of 1849, ch. 12, § 7, p. 85.)

Such cases, wherein the right to the office turns upon some mat-
142 ter of fact—either of omission or commission—which can only be inquired into properly in a proceeding to which the officer is a party,[1] are plainly distinguishable from the class, embracing the present case, wherein there is no matter of fact to be inquired into by a jury or otherwise, but a mere matter of law, which the court may properly determine. Where the commission appeared on its face to be consistent with the constitution and valid, the court would not go behind that commission and inquire into matter of fact not so apparent, such as the appointee's holding an incompatible office, or being an infant or a non-resident of the county.[2] Still less would it do so where the alleged matter arose subsequently to the period at which the appointee was regularly commissioned and qualified.[3] It is very different here, for the court may take judicial notice of acts of Congress and matters of history[4] in respect to the appointment in question. It judicially knows that at the date of the order awarding the appeal, to wit, the 17th of May, 1869, W. Wil-
loughby had no appointment as judge of the court of appeals ex-
143 cept such as was made under acts of Congress; and it can properly look at everything that materially bears on the validity of his appointment.[5]

Cases wherein the defect is collateral and could only be ascertained by investigation of matter of fact[6] may in the United States be applied consistently with the rule, that "when the legislature enact a law, not authorized by the constitution, it is the part and the duty of the judiciary to declare it void; that when the executive in any act or appointment overleaps the bounds prescribed to it by the constitution and the laws, it is alike the part and the duty of the judiciary to pronounce such an act or appointment null and void."[7] As was said by Walworth, Ch., in 1840, "should the executive or the legislature, either by a public statute or otherwise, assign the duties of judges of the supreme court to the several clergymen of a city for the time being, or attempt to authorize them by virtue of their clerical offices to be judges and to hold the supreme court in violation of the constitution, such clergymen would

[1] In Kentucky, in 1843, Marshall J., said: "He appears to have been exercising the office and authority of a justice of the peace publicly, and without any public question of his right to do so. He exercised that office, too, under a regular commission, and therefore by color of title. The execution under which C. acted was regular on its face, issued by one thus publicly acting as a justice under a regular commission; and neither that writ, nor any other part of the proceeding to which it belonged, disclosed his want of authority to act under the commission which he had received. But the facts which disqualified him from acting under his commission, and rendered his attempt to do so unconstitutional, and therefore illegal, were facts dehors the record" (Rodman v. Harcourt, &c., 4 B. Monroe, 232.) Yet if a person was constitutionally ineligible to the office of sheriff when elected, the law will not so far encourage a violation of the constitution as to permit him to protect himself under a mere color of authority exercised in opposition to an express mandate of the constitution, when, too, he must have known that his title to the office was not legal, and therefore that all his acts as sheriff were without authority and against law. (Patterson v. Miller, &c., 2 Metcalfe, (Kentucky,) 448.)

[2] State v Messmore, 14 Wisconsin, 163; State v. Bloom, 17 id., 521.

[3] As in Griffin's case cited in 20 Grat., 47.

[4] The Grapeshot, 9 Wallace, 144; Gay v. Gold, 13 id., 362.

[5] In construction of law, each judge knew every other in the first case of judges reported in 4 Call., 1.

[6] In Massachusetts in 1812 third persons could see that the law gave the governor power to appoint a sheriff; and after the law came in force they could see a man exercising the office of sheriff; but without investigation of matter of fact they would not know that the date of the appointment was two months sooner than it should have been. (Fowler v. Bebee, &c., 9 Mass., 222. cited in Burke v. Elliott, 4 Iredell, 364.)

[7] Com. v. Fowler, 10 Mass., 302. On an information in the nature of a quo warranto there was a judgment of ouster, in 1860, in People v. Bangs, (24 Illinois, 184.)

not be judges of that court de facto, so as to make their judgments valid or binding upon the parties thereto."[1] So here the act of Congress purporting to authorize the general, with military authority, to
144 appoint the judge in question was unconstitutional and void, and, consequently, conferred no authority to make such appointment. "In all cases the military should be under strict subordination to and governed by the civil power.[2] If without the acts of Congress the general had made the appointment, W. Willoughby must have been regarded as an usurper; the usurpation is none the less because of these unconstitutional acts.

The argument of Joynes, J., in 1870,[3] that the schedule to the constitution of Virginia applied to the military appointees, was, before that argument was made, met in reasoning of Anderson and Moncure, J's.,[4] which, it is thought, has not been answered and is unanswerable.

The act done by this so-called de facto officer, on the 17th of May, 1869, being void, it follows that no appeal from the decree rendered by the circuit court, on the 13th of September, 1867, was effectually taken within two years from the date of that decree, as required by the act of March 13, 1867,[5] and that decree remains forever binding. For no matter what may have been attempted by the act of assembly of the 5th of March, 1870,[6] cited in 20 Grat., 33, it was beyond the power of the legislature to make the act so done, on the 17th of May, 1869, legal and binding.

By the decree of the 13th of September, 1867, a right was vested in Robert B. Bolling to possess certain real estate according to the
145 law of the land.[7] To permit that right to be taken away or impaired by the operation of the act of the 5th of March, 1870, would not accord with fundamental principles.[8]

Since Ogden v. Blackledge, (2 Cranch, 279,) there has been much discussion upon the question whether a court has power, by virtue of a resolution or act of the legislature, to hold a defendant liable, notwithstanding the law to the contrary which existed until such resolution or act.[9] In the Supreme Court of the United States, in 1819, Marshall, C. J., delivering the opinion of the court, said: "If in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the

[1] The People v. White, 24 Wend., 540. In the case before him, he said: "If the aldermen, as elective officers, were constitutionally incompetent to hold a court of oyer and terminer in conjunction with the circuit judge or the first judge of the court of common pleas, then the law which in terms attempted to confer on them such a power was unconstitutional and void, and it conferred no power whatever." (S. C. 24 Wend., 541.)

[2] Va. bill of rights of June 12th, 1776, art. 13.

[3] 20 Grat., p. 113 et seq.

[4] Id., p. 58 to 62 and p. 95 to 101.

[5] Sess. Acts, 1866–'7, p. 789, ch. 19.

[6] Sess. Acts, 1869–'70, ch. 18, p. 17.

[7] When it is said "that a right is vested in a citizen," it is meant tha the has the power to do certain actions; or to possess certain things according to the law of the land. (Chase, J., in Calder v. Bull, 3 Dall., 394.)

[8] "Every law that takes away or impairs rights vested agreeably to existing law is retrospective, and is generally unjust, and may be oppressive." (S. C., 391.) "It may, in general, be truly observed of retrospective laws of every description that they neither accord with sound legislation nor the fu damental principles of the social compact." (Paterson, J., S. C., 397.) The argument of Kent, C. J., in Dash v. Van Kleeck, (7 Johns., 505, et seq.,) with which Story, J., was disposed to go a great way, (Society, &c., v. Wheeler, 2 Gall., 139,) is supported by subsequent cases. (Bedford v. Shilling, &c., 4 S. and R., 404; Propr. Ken. Purchase v. Laboree, &c., 2 Greenl., 294; Martindale v. Moore, 3 Blackf., 282.)

[9] Holden v. James, 11 Mass., 401.

statute, should be construed to be within it, there would be little doubt of its unconstitutionality."[1] Courts of the States have acted on the same principle;[2] and in the converse case.[3] Where, according to the statute in force at and after the time that the right of action accrued, that right had become barred, it is held that no statute subsequently passed would renew the defendant's liability.[4] The doctrine is
146 that "the legislature cannot remove a bar or limitation which has already become complete;"[5] in other words that, in respect to a cause of action which was barred before the new statute went into operation, such new statute shall have no effect.[6]

Nor can the legislature, after a verdict, grant a new trial;[7] or after a decree, when an appeal therefrom is barred, remove the bar. It is not within its constitutional power to direct that the cause should be heard again, and thus make that which was a final decree in the defendant's favor on the merits, liable to be affirmed or reversed, as the new hearing might terminate for or against him. So it was held in New Hampshire in 1818,[8] in Vermont in 1824,[9] in Maine in 1825. In the latter State when it was urged "that the authority exercised by the legislature is not in any degree judicial; that the resolve goes no farther than to authorize a re-examination of the cause, to empower one judicial court to review the proceedings of another judicial court by way of appeal," Mellen, C. J., said: "It is true the resolve does not in terms purport to transfer property directly from one man to another by mere legislative authority; but it professes to grant to one party in a cause which has been, according to existing laws, finally decided, special authority
147 to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial, the consequence of which may be the total loss of all those rights and all that property which the judgment complained of had entitled him, and those claiming through or under him, to hold and enjoy; that is to say, it professes to accomplish in an indirect and circuitous manner that which the existing laws forbid, and which, by a direct and legal course, cannot be attained."[10]

In several, if not in all, of the previous cases, the statutes in question were made for particular transactions and were not general laws. Still the grand principle relied on was, that those statutes affected individual rights, already so established that the legislature could not intermeddle therewith. Observing this, Hutchinson, C. J., of Vermont, said, in 1831: "Statutes which grant individual relief are not, for that reason, void.

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[1] Sturges v. Crownshield, 4 Wheat., 207.

[2] Eakin, &c., v. Raub, &c., 12 S. R., 340, 343, 360, 362, 363.

[3] Wourt v. Winnick, 3 New Hampshire, 482; Davis v. Minor and wife, 1 How., (Missis.,) 189; Battles, &c., v. Forbes, 18 Pick., 532; 19 id., 578; Wright v. Oakley, &c., 5 Metcalf, 405.

[4] In Arkansas in 1846, Couch v. McKee, 6 Arkansas, (1 Eng.,) 495. In Vermont in 1847, Wires, &c., v. Farr, 25 Verm., 46. In Indiana in 1847, in McKinney v. Springer, 8 Blackf., 507, and in 1851, in Stipp v. Brown, 2 Carter, 648.

[5] Page v. Melvin, 10 Gray, 210; Bigelow, C. J., in Bigelow v. Bemis, 2 Allen, 497; Prentice v. Dehon, 2 id., 353; Ball v. Wyeth, 99 Mass., 339.

[6] Girdner v. Stephens, 1 Heiskell, 280, 2 Am. R., 704; Ang. on Lim., 22, 23, note; Smith's Com. on Stat. and Const. Law, section 359, p. 517 et seq.; Sedgw. on Stat., ch. 5 p. 166 to 170, and p. 679 et seq.; Cooley's Const. Lim., p. 365, ch. 11.

[7] Young v. State Bank, 4 Indiana, 303; Taylor & Co. v. Place, 4 Rhode Island, 324.

[8] Merrill v. Sherburne, &c., 1 N. Hamp., 202.

[9] Bates v. Kimball, 2 Chipman, 82. This case ruled Staniford v. Barry, 1 Aiken, 315 Both of these cases are recognized in Bradford, &c., v. Brooks, &c., 2 id., 294.

[10] Lewis, &c., v. Webb, 3 Greenl., 332. The soundness of this decision was not questioned in 1826. Durham v. Lewiston, 4 id., 143.

It is their taking rights from other individuals that renders them void. A general statute, with this effect, is void also."[1]

These principles have become settled constitutional law, and are constantly recognized and acted upon by judicial tribunals in this country. "They not only grow out of the letter and spirit of the Constitution, but are founded on the very nature of a free government, and are absolutely essential to the preservation of civil liberty and the equal and permanent security of rights."[2] There is ground to hope that they have not altogether ceased to exist in Virginia, when it is seen that even in the cases decided by the court of appeals at November term, 1870, Joynes, J., admitted it to be "clear that if the decrees," then before the
148 court, "were void when rendered from the want of authority in those who rendered them, to render any decree whatever, they are void now as they were at first, because it was not in the power of the legislature to make them valid by confirmation."[3]

II. In Virginia, so long ago as 1788, it was provided that "the court of appeals shall consist of five judges," and that "any three of the said judges shall constitute a court."[4] The number was less than five from January 14, 1807, to January 9, 1811.[5] But the evils from the reduced number were so great that on the day last mentioned it was again enacted that the court shall "consist of five judges," and that "any three of said judges shall constitute a court.[6] Such has continued to be the number,[7] except while the government of the State was under the Alexandria organization.

When a majority of the judges of the court of appeals were interested, and other judges were summoned, there might be a special court of a greater number,[8] but according to the act of January 9,
149 1818, so many as would make "the number at least five," were to constitute the special court.[9] The act of March 15, 1832, provided that there should be appointed so many as, with the judges of the court of appeals not interested, "will make the number five," who, or any three of whom, shall constitute a special court; or if all the judges of the court of appeals are interested, then that "five at least shall be appointed, who, or any three of whom, shall constitute a special court." The designation was always to be of so many as, with the judges of the court of appeals not interested or otherwise disqualified, "will make the number five;" "and any three of the said judges then associated might constitute a special court."[10] Under resolutions

[1] Hill. &c., v. Sunderland, 3 Verm., 514.

[2] Prentiss, J., in 1 Aiken, 315.

[3] Griffin's exer. v. Cunningham, 20 Grat., 111. In 1872, the invalidity of a decree made by one of the military appointees on a bill in chancery was discussed in a printed argument, but a decision on this question became unnecessary, because the judges unanimously concurred that, on the merits, the decree of the military appointees should be reversed and the bill dismissed in toto. Myers' exor. v. Zetelle, 21 Grat., 733.

[4] 12 Hen. Stat., 764, c. 68.

[5] Upon the resignation of Paul Carrington, it was enacted (January 14, 1807) that the "court shall consist of four judges, any three of whom shall constitute a court, until a vacancy shall again occur," "after which event the said court shall consist of three judges any two whom shall constitute a court." (Sess. acts, 1806–'7, p. 13, ch. 22.) This act was repealed by that of January 9, 1811. (Sess. acts, 1810–'11, p. 5, ch. 4, § 1.)

[6] Id. § 2.

[7] 1 R. C., 1819, p. 189, ch. 64; Sess. acts, 1830–'31, p. 37, ch. 4, § 1; Code of 1849, ch. 160, § 1; Constitution of 1851, art. 6, § 11; Constitution of 1868, art. 6, § 2.

[8] Under the acts of the 19th of November, 1789, in 13 Hen. Stat., ch. 18, § 9, pp. 25, 26; and October 26, 1792, in id., ch. 11, § 6, p. 408.

[9] 1 R. C. 1819, p. 190, ch. 64, § 5; id., p. 195, ch. 65.

[10] Sess. acts, 1831–'2, ch. 47, § 1, 4, p. 39; Sup. to Rev. Code, pp. 124–'5, ch. 95, § 1, 4.

adopted by the house of delegates on the 13th of January, 1848, the revisors made the report of the 24th of that month, which resulted in the act of March 31, 1848,[1] whereby five judges were designated to constitute the special court, sustained as constitutional.[2] It did not then occur either to the revisors or the legislature that three circuit judges would be a good substitute for five judges of the supreme court of appeals. Nor is it supposed that such a thought occurred to the framers of the constitution of 1851. They knew, or may be supposed to know, that the act March 31, 1848, had been passed under a constitution, whereby the judicial power was "vested in a supreme court of appeals, *in such superior courts as the legislature may, from time to time, ordain and establish, and the judges thereof*, in the county courts, and in justices of the peace;" and that the words in italics had great influence on two of the judges who sat
150 in Sharpe v. Robertson.[3] They could see that those words were not in the instrument framed in 1851; and that the question as to the validity of a special court, however difficult it might have been under the constitution of 1830, might be attended with more difficulty under that of 1851, unless the power to form it was expressly given, and, therefore, it was given by section 12 of article 6. After providing for district courts, to be held by five judges or any three of them, they never meant to allow a special court of appeals to be formed of three judges or any two of them. Accordingly the draftsman of the act of February 25, 1854,[4] and those who passed that act, provided for a special court to be holden by five judges or any three or more of them. Yet in disregard of all previous legislation, the act of February 26, 1872, has been passed under the constitution of 1868, the language of which, so far as relates to this matter, is identically the same with that of the constitution of 1851.[5] This language, in 1868, meant no more than it did in 1851. It never meant that a special court might be formed to consist of not less than two nor more than three judges, but its true intent and meaning was that a special court may be so formed, that when it is sitting there shall always be therein "not less than three nor more than five judges;" and, consequently, five must be designated there-
151 for. In the case of a voluntary submission to arbitration empowering a person or persons to form a board of arbitrators "to consist of not less than three nor more than five," if the board was formed to consist of three and the award was made by two, such award would be clearly void.[6] When there is a submission to legislators to form a court "to consist of not less than three nor more than five," if a court is formed to consist of three, and the decree is made by two, such decree is equally void. Nor will it do in such case to talk of their being judges de facto. "The direct denial of their jurisdiction or authority, before the final adjudication of any case by the party over whom they claim to exercise jurisdiction, whether it be by plea or exception on any cause of

[1] Sess. acts, 1847-'8, p. 51, ch. 68.

[2] In Sharpe v. Robertson, 5 Grat., 518.

[3] See Baldwin, J., 5 Grat., 603, 618, and Allen, J., 629. The latter, speaking of the special court of 1848, said: "The court falls within the class of superior courts, which the legislature may, from time to time, ordain and establish, and assign to it such jurisdiction as the legislature may think proper." (See also pp. 631, 632, 633.)

[4] Sess. acts, 1853-'4, p. 18, ch. 17.

[5] "Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals, and of the circuit courts, or any of them."

[6] Tetter v. Rapesnyder, 1 Dall., 293: Russell v. Gray, 6 S. & R., 145; Welty v. Zentinyer, 4 Watts, 75.

error upon the record, is one of the direct and constitutional modes provided for the protection of private rights against legislative or executive aggression."[1] Here the proceeding is in a court without jurisdiction and is null.[2] "It is a trial without authority of law;" "and the decision has no binding force."[3] In the language of the Supreme Court of the United States, the act "creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction."[4]

III. Since the statute of 27 Hen. 8, c. 24, section 2, it has been laid down in England, that none but the King can make justices of the peace, and that the King cannot grant a power to another to make them.[5]

152 In connection with this position, Bayley, J., adverts to the power given to justices of the peace, and the talent and integrity required in executing the office, and observes that a certain discretion ought to be exercised in selecting persons fit for the office.[6] True as this may be as to a justice in England, it is no less true as to a judge in Virginia. Accordingly the constitution provides (in section 5) that "the judges shall be chosen by the joint vote of the two houses of the general assembly." If past history authorizes the conclusion that particular persons to form a special court of appeals need not be chosen by joint vote of the assembly, it also supports the conclusion that they should not be chosen by the supreme court of appeals. For, under the laws in force from the 19th of November, 1789, to the 31st of March, 1848, the supreme court of appeals was never allowed to designate judges to constitute a special court[7] except in a cause wherein all the parties litigant consented thereto.[8] And in Sharpe v. Robertson, those laws were regarded as furnishing a precedent directly in point and sustaining the act of 1848.[9]

IV. According to the first section of the act of February 28th, 1872, the special court therein mentioned is "for the trial of such causes, civil and criminal, as the court of appeals cannot dispose of with convenient dispatch, and shall certify to it, as provided in article sixth, section three, of the constitution of the State, not exceeding fifty at a time."

153 Now, though it is provided in article sixth, section three, that special courts may be formed "to try any cases on the said docket which cannot be otherwise disposed of with convenient dispatch," yet it is not provided therein that the court of appeals shall certify such cases to the special court, nor was it the intent of the constitution that they should do so. In construing that third section, which contains the only power that exists in the present constitution to form special courts, regard must be had to the maxim "expressio unius est exclusio alterius," and to the act of the 31st of March, 1848, as passed and construed, so far and so far only as its construction applies to the words used in the third section. Approving the principle "that a cause in the supreme court of appeals shall be heard before a special court if it be necessary to prevent the hearing of the cause being delayed an unreasonable length

[1] Verplanck, Senator, in People v. White, 24 Wend., 508.
[2] Mora v. Kuzac, 21 Louis. Ann., 754.
[3] Gale v. Michie, 47 Missouri, 326.
[4] Hickman v. Jones, 9 Wallace, 201.
[5] Com. Dig., tit. Justice of the peace, citing Dalton, section 10.
[6] Bayley, J., in Jones v. Williams, 3 Barn. and Cress., 768, 10 Eng. C. L.
[7] Under the act of the 19th of Nov., 1789, a summons issued to all of the judges other than those of the court of appeals. So it was until the act of March 15, 1832; and then the power of designation was given not to the court of appeals but to the general court. Sess. acts 1831, 2 ch. 47, § 1.
[8] Id., § 4.
[9] See Allen, J., 5 Grat., 641, and Brooke, J., id. 642-'3.

of time," (5 Grat., 571, 572,) the general assembly, in 1848, was nevertheless careful to provide for a hearing by the supreme court of appeals of causes which ought to be heard by it. The act of 1848, so far from enacting that the court of appeals might certify any causes that it pleased to a special court, prescribed in section four how the docket was to be made out for the special court, and provided that "no case shall be placed on such docket where any party by himself or his counsel shall object thereto."[1] While under other provisions of the act of 1848, a sufficient number of causes went to the special court, this provision was constantly made use of to retain for hearing by the supreme court of appeals a cause which a party or his counsel thought ought to be determined by that court, or which he believed might be determined as soon, or nearly as soon, by it as by the special court. The security thereby fur-
154 nished for a hearing by the supreme court of cases which ought to be heard by it, was greatly increased by the following provision recommended by the revisors, and enacted as part of section five:

"In the interval between the time at which the court of appeals may commence its session in the fall and the time at which such special court may commence its session in December,[2] the said court of appeals at Richmond may hear and determine any cause which may remain depending therein, notwithstanding it may have been on the docket so made out under the preceding section."

Such is the act, the principle of which was approved by judges of the supreme court of appeals in Sharp v. Robertson,[3] and was recognized and approved by the framers of the present constitution. Neither that act nor any acts previous thereto furnish a precedent to support the first section of the act of 1872. The large power conferred on the court of appeals by this section—of certifying to the special court causes "not exceeding fifty at a time"—besides being without precedent, is open to serious objection on principle.[4]

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[1] The act of February 25th, 1854, provided for such objection in writing. Sess. acts, 1853, '43, on p. 18, ch. 17, § 1, 2.

[2] Under the act of 1848, the special court did not sit in the summer, but commenced its session in December, and proceeded during the winter.

[3] See Brooke, J., in 5 Grat., pp. 642, 643.

[4] A letter of Sept. 9, 1872, from the undersigned to the president of the supreme court of appeals, expresses the following sentiments: "You and your associates will concur with me in approving that wise rule of the common law which prevents a judge from acting where a certain benefit or disadvantage to him will be the consequence of his action. You will concur with me also in thinking that the smallness of such benefit or disadvantage may not always remove the objection to his acting, and that the objection may lie, though it may be supposed that the action of the judge could not be influenced by such benefit or disadvantage. In a famous cause before the House of Lords, in 1852, Lord Campbell C. J., said; 'No human being can suppose for an instant that my Lord Cottenham could be in the remotest degree influenced by the infinitessimally small interest that he had in this concern, nor if his interest had been ever so great; but, my lords, it is of the last importance that that maxim should be held sacred, that no man is to be a judge in his own cause; and that is not to be confined to a cause in which he is a party, but a cause in which he has an interest.' (Dimes v. Grand Junction Canal Co., 16 Eng., L. & Eq., 71.) He thought it would 'have a most salutary influence when it is known that this high court of last resort, in a case in which the lord chancellor had an interest, considered that his decision was not according to law and must be set aside.' He added: 'This will be a lesson to all those in the inferior tribunals to take care that in their decisions they may not be influenced by their personal interest and to avoid the appearance of doing what is wrong' (Id. 81.) In the present instance there is no interest in the final result of a particular cause; there is only that which is apparent on the face of the act of February 28th, 1872—the power of certifying to a special court, from time to time, causes, 'not exceeding fifty at a time,' the consequence to the judges of their certifying or not certifying: the benefit to them from the former, or the disadvantage to them from the latter. Yet the minds of judges will naturally turn to the enquiry, whether there may not be apprehension of a tendency to bias in action under the first section of that act, and whether it may not be advisable to guard against it.

155 V. The constitution of 1830, under which the act of 1848 was enacted, having contained material words[1] which are not in the present constitution, and the power under the latter arising altogether from these words, "to try any cases on the docket which cannot be otherwise disposed of with convenient dispatch," it is clear that the general assembly would have exceeded its power and done an unconstitutional act if it had in so many words enacted that the first fifty cases on the docket of the supreme court, which had not already
156 been heard, should not be heard by it, but should be heard by the special court. That which has been done must be equally a violation of the constitution, unless a difference be produced by conferring on the judges a discretion which was not exercised when, in April, 1872, they certified to the special court the first fifty cases without exception.

An exception ought to have been made of this important cause; for, without unreasonable delay, it might have been heard by the supreme court, either in its order on the docket or out of that order; and it should have been heard by it, not only because of the character of the cause in respect to the subject-matter of the suit, but also because of questions under the Federal Constitution and the constitution of the State as to the constitutionality of laws, for the decision of which questions the supreme court was, and the special court was not, the constitutional tribunal.

VI. The character of the cause would have been made known—the objections to a transfer of it from the supreme court would have been stated—if there had been an opportunity of doing so, as the manner was under the acts of 1848 and 1854, or in any other manner.[2] But there was no such opportunity.[3] To transfer this important cause
157 from the supreme judicial tribunal of the State, composed of five judges, to an inferior tribunal consisting of only three circuit judges, was a step in the cause which might cause a party to be deprived of his freehold, and therefore a step which, according to the law of the land—the great principle of Magna Charta—should not have been taken without giving to such party or his counsel an opportunity of be-

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It seems to me that the court of appeals should not have been the instrument to designate judges as provided in that first section, nor the instrument to certify causes to such extent as thereby provided; that it should have been left as the supreme judicial tribunal of the State to pass on all questions that might arise as to the constitutionality of the act, or in anywise affect its operation, free from the bias that such instrumentality has a tendency to produce. If such a duty as I had in respect to the act of 1848 were now devolved on me in respect to the act of February 28th, 1872, it seems to me that in the faithful performance of that duty I would advise against such a provision as that in the first section of the last-mentioned act, and if it was already in the statute-book, would recommend a repeal or material alteration thereof. It may be worthy the serious consideration of the judges whether they should not make such a recommendation. An amicus præsidentis and amicus curiæ thinks this course may well be taken by judges anxious to support and maintain the constitution of the State, to uphold the supreme judicial tribunal thereof in its proper dignity, and to preserve it in the way in which it ought to be preserved in order to be a blessing of great value."

[1] The judicial power shall be vested in a supreme court of appeals, in such superior courts as the legislature may from time to time ordain and establish, &c.

[2] If there had been notice that on a certain day the first fifty cases would be called and the counsel for a party to a cause might, on its being so called, state his objections to its being certified, then there might and would have been in Lersner v. Bolling a statement of such objections as might and probably would have been deemed by the court sufficient to prevent its being certified.

[3] It had been contemplated by counsel that there would be such opportunity, and that in Lersner v. Bolling the transfer would be objected to. In a letter of the 21st of April, 1872, Mr. Jones said: "On Saturday the court adjourned, after assigning fifty cases to the special court, Lersner v. Bolling being one of the last on the list of fifty. The court did not consult counsel about it. It merely swept off the first fifty. I am very sorry for it."

ing heard in regard to it.[1] Where an order for an issue was improvidently made, it was thought the error could only be repaired by disregarding the verdict on that issue.[2] Here the error can only be repaired by disregarding the decree.

VII. The essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen by giving security against arbitrary imprisonment and arbitrary spoliation.[3] The great charter was familiar to the statesman[4] who, in 1776, drew the bill of rights of Virginia, which, in its first article, specifies as among the inherent rights of men "the enjoyment of life and liberty with the means of acquiring and possessing property." In its exposition of such language, the Supreme Court of the United States has said that, by its true intent and meaning, "property cannot, by a mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be
158 subjected to the government of principles, in a court of justice, which must necessarily produce that effect;"[5] moreover the Constitution of the United States contains that which Marshall, C. J., thought might be deemed "a bill of rights for the people of each State,"[6] and which the Supreme Court has said "cannot be evaded by the form in which the power of the State is exerted."[7] In the fifth article of amendments to this Constitution, it was provided that no person shall "be deprived of life, liberty, or property without due process of law." This operated merely as a restriction upon Federal power.[8] Now by the fourteenth amendment there is upon State power a like restriction, that no State shall "deprive any person of life, liberty, or property without due process of law."[9] According to judicial construction of this language, not only was the fifth article of amendment violated by the acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, mentioned on the first page, but the 14th amendment was violated by the act of the general assembly of Virginia approved March 5th, 1870, mentioned on p. 19. The legislature could not by the last-mentioned act deprive the defendant of a bar, which was complete under the previous statute, and give a new right.[10] The supreme court of Wisconsin, in 1860, held that it was not competent for the legislature by a new statute to renew a right to bring an action which had
159 been lost, and deprive the opposite party of a defence which he had secured by possession.[11] That court holds, "that if the time limited by statute for commencing a suit for the recovery of the possession of lands sold for taxes expires while the statute is in force, and before the suit is brought, that the right to bring the same is barred, and

[1] 2 Inst., 45; 6 Rob. Pract., vol. 5, pp. 625, 626, 627; Joynes, J., in Griffin's exor. v. Cunningham, 20 Grat., 108.

[2] Wise v. Lamb, 9 Grat., 309. This case shows that there is nothing amounting to consent or acquiescence, even if either would have given jurisdiction, which it would not. (Clayton v. Per Dun, 13 Johns., 218; 1 Rob. Va. Pract., p. 27 to 29 of edi. 1832; 6 Rob. Pract., ch. 14, § 4, p. 316.

[3] Hallam's Middle Ages, vol. 2, p. 447.

[4] George Mason.

[5] Webster v. Cooper, 14 How., 504.

[6] Fletcher v. Peck, 6 Cranch, 138.

[7] Cummings v. State of Missouri, 4 Wallace, 329.

[8] Fox v. Ohio, 5 How., 434.

[9] 14 Stat., 358, No. 48; 15 id., 708.

[10] Burch v. Newburg, 14 N. Y., 6 Selden., 396, 397; Parsons v. Russell, 11 Mich., 113; Ames v. Port Huron Co., id., 139; People v. Frisbie, 26 Calif. 134.

[11] Sprecher v. Wakely, &c., 11 Wisc., 438.

no subsequent legislature can renew that right;" that it was not competent to the legislature to divest the right thus acquired;[1] that they could not, by a repeal of the statute or otherwise, restore the right and give a remedy to enforce it. Dixon, C. J., said: "The right being gone, of course the remedy fell with it; and as there could be no remedy without a corresponding right, it was useless for the legislature to restore the former, so long as it was prohibited by the constitution from interfering or meddling with the latter."[2] There are like decisions in other States.[3]

Connected with the act of the 5th of March, 1870, are the proceedings under color of the act of February 28th, 1872,[4] whereby there has
190 been a decree which, in violation of said fourteenth amendment, will deprive the defendant of "property without due process of law" if such decree be allowed to operate.

That amendment has raised a barrier against the perpetration of outrage under color of legislative acts; under the forms of law without its substance.

Lord Hardwicke once spoke of a cause of great importance as being "of a nature worthy the judicature of a Roman senate, rather than of a single judge." On the present occasion, the judge before whom this cause comes has no choice but to perform his duty, according to a solemn oath to support and maintain the Constitution of the United States and the constitution of the State of Virginia. Yet, perhaps he may have Lord Hardwicke's consolation, "that if" he "should err in"

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[1] Hill v. Kricke, id., 446.

[2] Knox v. Cleveland, 13 id., 249.

[3] In Maine, in 1862, Atkinson v. Dunlap, 50 Maine, 6 Hubbard, 117. Again in Wisconsin, in 1867, Davis, &c., v. Menasha, &c, 21 Wisc., 495. In Alabama, in the same year, (1867,) Carleton, &c., v. Goodwin's exer., 41 Alaba., 157. In Tennessee, in 1870, Girdner v. Stephens, 1 Heiskell, 280, 2 Am., Rep., 780.

[4] On the 13th February, 1873, there was delivered to the president of the special court of appeals a letter to the following effect:

"To the judges of the special court of appeals:

"I have heard with deep concern that two of the judges sitting in Lersner v Bolling pronounced an opinion in favor of decreeing a specific execution of the contract of the 18th of January, 1863; and am pleased to learn that a petition for a rehearing has been presented by Mr. Jones, and is supported by an argument of Colonel Mosby, which has been printed and placed before the judges. I cannot suppose that the question as to specific execution will be closed without a rehearing in a case of great magnitude, involving important principles and a subject of great value, wherein the four judges who have heard it are divided in opinion; Judge Thomas, in the court below, and Judge Barton, in this court, being against specific execution, though Judges Wingfield and McLaughlin are the other way. It is very desirable that these conflicting opinions should be passed upon by the supreme court of appeals, consisting of five judges. By none should this be more anxiously desired than by the judges who pronounced those opinions. Especially, as it seems to me, ought it to be desired by Judges Wingfield and McLaughlin: for it is a serious thing to take a large property from one man and give it to another. And all must admit that if Judge Thomas, in the court below, and Judge Barton, in this court, are right, then the property ought not to be taken from Robert B. Bolling and given to Gustavus Lersner. Under all the circumstances, I respectfully suggest, that this court should not only set aside the decree entered during the present term and grant a rehearing, but afterwards, in due time, transfer the cause to the supreme court of appeals; it appearing that power to make such transfer has been given by the act of the 17th of January, 1873.

"After a careful investigation of the subject, without any pecuniary interest to bias me, (having in the case no contingent fee, either large or small,) I have a thorough conviction that principles of equity, long and well established, require and demand that specific execution should in this case be denied. Such, I believe, would be the conclusion of the supreme court of appeals, after argument before that tribunal. For I am well satisfied that neither Hale v. Wilkinson, nor any other case decided by that court, will authorize a decree of specific execution under such circumstances as appear in the record of Lersner & Bolling.

"I remain, respectfully, yours,

"CON. ROBINSON."

"FEBRUARY 13TH, 1873."

161 his "judgment, there is a judicature equal in dignity to a Roman senate that will correct it." For this cause may go to the highest court of the State in which a decision can be had, by judges so situated as not to make it improper for them to sit on its hearing; and afterwards, should there be occasion therefor, it may go before the Supreme Court of the United States.

CONWAY ROBINSON,
One of Bolling's Counsel.

THE VINEYARD, NEAR WASHINGTON CITY, *March* 31, 1873.

162 District court of appeals, district IV.

LERSNER
vs.
BOLLING.

To the judges of district court of appeals for the fourth district, at Fredericksburg:

Your petitioner, Gustavus Lersner, respectfully represents that he is aggrieved by a decree of the circuit court of Fauquier, in a case in chancery lately pending therein, in which he was complainant and Robert B. Bolling *for* defendant, rendered on the 13th September, 1867, the record of which is herewith presented. Decree is to be found on p. 151 of record.

The facts of the case in detail need not be set forth in this petition—the bill, answer, and depositions being very voluminous—but a narrative in brief will be attempted:

Bolling owned an estate in Fauquier called Bollingbrook, and had a right to a deed for another called Ben Lomond, under a sale made in the chancery case of Armistead vs. Armistead, pending in the circuit court of Fauquier.

By a contract in writing and under seal, dated January 19, 1863, Bolling "agrees and obliges himself to sell" the same to your petitioner, with live-stock and personalty thereon, "for and in consideration of the sum of $77,000," and your petitioner agreed and obliged himself
163 to pay the same thus: $17,000 on 1st February, 1863; $30,000 on 1st March, 1863, and $30,000 on 10th March, 1863. Upon payment of the purchase-money Bolling agreed and bound himself to make a deed for Bollingbrook with general warranty, with or without the consent of Mrs. Bolling, (who was dead before this suit was brought.) But Bolling was to hold the possession and use of the property until one month after the close of the war, when possession was to be delivered to your petitioner. This contract was written by Bolling. (P. 113, record.)

Various payments were made by your petitioner to Bolling, perhaps not at the day, but were received by him without objection, leaving a balance due of about $30,000, for which, prior to the 18th of April, 1863, Bolling by message to Lersner made a demand, which resulted in a payment that day under the following circumstances:

The parties met at the banking-house of Lancaster & Co., in Richmond, and R. A. Lancaster in his deposition (pp. 51, '2, '3) details the acts there occurring.

Bolling was there demanding payment for the farm he had sold, and saying that if Lersner did not in a short time pay he would consider him (Lersner) as wishing to cancel the contract. Lersner came next

day and proposed to sell some sterling bills, to be secured by a deed of trust on the farm he was buying from Bolling. While Lancaster was engaged in negotiating them to Branch, upon the terms of a deed on the farm, Bolling came in, and on being informed of it, and that the bills were to be "secured as aforesaid, he said that to save trouble he would endorse the bills himself and retain the title to the farm." (P. 51, record.) Bolling endorsed the bills at his own suggestion. (P. 52, record.) And Lancaster says, afterwards: "Bolling agreed to endorse the sterling bills and retain the title to the farm as his security." (P. 52, record.) Bolling did endorse the bills, and the proceeds were $27,600 in confederate currency.

Lancaster, for Lersner, paid to Mr. Bolling $30,000, the amount of the payment due March 10, 1863; $172.36 interest thereon from that date to April 18, 1863, and on Bolling's demand for enough to purchase confederate 8 per cents. at par, as they stood on the 10th of March, 1863, having advanced 2½ per cent. on the 18th of April, 1863, Lersner paid $750 more, in all, $30,922.36. Bolling at once bought $30,000 of Confederate State bonds for $30,750, and received the interest of $172.36. (Pp. 52, '3.) See also Bolling's deposition, (p. 147-'8, record.)

164 Thereupon Bolling executed a receipt to Lersner for "$77,000, in payment of Bollingbrook and Ben Lomond estates in Fauquier County, Va., say 1,110¼ acres," signed by him and dated April 18, 1863. There was added to the receipt these words: "The deed to executed for the first tract, and a decree authorized for the second when the conditions mentioned in the contract between Bolling and Lersner dated January 19, 1863, shall be fully complied with and performed. This, being signed by Bolling, was handed to Lersner. (P. 9, record.)

At the same time there was endorsed upon the contract, in Lersner's hand, (each party had a copy of the contract, which was in duplicate,) a paper signed by Lersner, to the effect that as Bolling had endorsed these bills for $1,200 in aggregate, drawn by him, dated April 18, 1863, Lersner is to get a deed for the land named "in the within," &c., whenever the bills, cost, and charges are paid and Bolling fully released from liability therefor. "No deed or decree is to be claimed until the above-mentioned bills of exchange endorsed by R. B. Bolling shall be paid, and the said Bolling absolved finally from all liability." (P. 8, record.)

The result of this transaction of the 18th of April, 1863, is easily stated and comprehended.

Payment in full for the land was demanded and made. A receipt in full was executed. By the terms of the contract, Lersner was thereupon at once entitled to his deed with general warranty. Had it then been made, all controversy would have been avoided. Bolling was paid principal, interest, and damages for the failure to pay in time, since which stocks had risen. Why was not the deed made? The answer is that Bolling became endorser for Lersner. Had Branch bought bills the deed would have been made by Bolling to Lersner, and a deed of trust for the protection of Branch. But Bolling interposed, became endorser, and to save trouble, (his own words,) instead of making a deed and taking back a deed of trust, retained the title as his security against his endorsement. Hence, giving a voucher for payment to Lersner, he caused Lersner to put upon the contract, which bound him to convey on the receipt of payment in full, a condition to his obligation to make a deed that until the bills were paid no deed should be demanded. This was a mortgage in equity. The legal title remained in Bolling, not as vendor, but as lienor, whereby he was secured against liability as endorser.

As much controversy has arisen in this case from the bills in question, your petitioner will now proceed to give a history of them.

165 Your petitioner had brothers living in New York. Despite the war, he had sent to them large sums of money to be invested for his account in produce to be shipped to Europe. As he required them to complete the purchase from Bolling, he contrived, through Owen T. Holmes, whose deposition will be found on pages 137 to 147 of record, to ascertain that he might draw upon shipments made to Robert Rae & Co., at Liverpool, (p. 138, record,) and to the amount of $35,000.

Upon this information, so received, prior to April 18, 1863, he drew the bills in question, with reference, au besoni, to Crew, Wylie & Co.

These bills were at sixty days after sight. One of them, for £500, was held by Fraser, Trenholm & Co.; the other two, for £400 and £300, were held by Colwell, Shannon & Co.

They all came back dishonored. It turned out that Robert Rea & Co. lived in London, and, besides, that the parties who were to ship from New York to Liverpool had never done so for account of your petitioner, as they had told Holmes they had done. These parties had hopelessly failed, and your petitioner sustained heavy loss thereby.

The bill for £500 was never protested, as far as any notice was ever given, for non-acceptance, but was for non-payment, in September, 1863.

The others were protested for non-acceptance—August 10, and August 14, 1863, respectively—but never for non-payment, and notice was given of the protest for non-acceptance October 19, 1863.

When Lersner was apprized of all this, in December, 1863, or January 3, 1864, he came to confer with counsel, after having tried to settle the matter with the holders without effect. Counsel advised him to stand suit. (P. 56, '7, '8 of record.) He said he was unwilling to do so, unless with Bolling's consent. Bolling came, therefore, to same counsel, and, though expressing dissatisfaction and regret at being upon suspended paper, agreed that Lersner should contest his liability, which was primary, as between himself and Bolling, but desired suits to be promptly brought. Counsel advised that could be done by a notice from Bolling to the holders, under the statute of Virginia. This was done for him by said counsel, and suits were thereupon instituted by the holders against Lersner and Bolling. The defence was made by demurrer in the case of the £500 bill for want of protest for non-acceptance.

To the suit brought on the other bills, the general issue was pleaded. The plaintiffs asked leave to amend their declara-

166 tion in March, 1865, and filed it.

The court in which the suit on the £500 was pending failed to decide the demurrer, which was argued—a demurrer entered to the original and *are* amended declaration—and the papers were lost.

Thus up to the close of the war, in April, 1865, without fault on the part of your petitioner, the suits on the bills were undecided.

These suits had been brought at the notice of Bolling, and were pending against him up the close of the war, as well as against your petitioner, undecided.

The war being over, in June, 1865, your petitioner wrote the letter on p. 9 of record, requiring possession in thirty days from the date thereof, and offering to settle all mat ers connected with the contract on his part as might be proper and right.

Bolling thereupon declared he would not give possession, and indicated a contest with your petitioner, denying his claim under the contract. He also said he had paid the bills held by Colwell & Shannon,

without saying how much he had paid; but since the close of the war it turned out the payment was made in June, 1865. (P. 96, record.)

As soon as your petitioner became aware of Bolling's position in the matter, he decided to abandon his defence upon the drafts, for though, perhaps, he was not bound to do so, yet as Bolling repudiated a defence which had been made with his consent, your petitioner did not desire to continue it when his consent was withdrawn. He accordingly paid to Fraser, Trenholm & Co.'s attorneys the bill for $500, (p. 9, 10, rec.,) Sept. 7, 1865, and notified Bolling by letter of 15th Sept., 1865, that he had done so, and was ready and willing to settle with Bolling what he had paid to Colwell & Shannon, upon learning from him what the amount was, and should then demand his deed. Bolling declined any answer to this letter.

Your petitioner, therefore, brought his bill in the county court of Fauquier, Oct. 16, 1865. there being no circuit court at that time organized. The bill will be found from page 1 to 7 of rec. Bolling answered, (page 10 to 22 of rec.)

A mass of testimony was taken in the case. A record from New York, filed as Exhibit L with defendant's answer, covers of the record page 27 to 42. For total inadequacy and illegality it was excepted to.

167 The records of the suits in the bills will be found from page 83 to 104, and the deposition of Holmes taken in them to sustain the defence will be found pp. 135 to 157, record.

Much testimony reflecting upon your petitioner's private character was thrown into the record, the inelevancy of which was palpable, and he was advised it was as unnecessary for him to offer evidence to rebut it, as he was advised it was illegal to have introduced it.

(1.) The bill seeks specific execution of the contract of 19th of January, 1863. The answer meets it by many objections.

The contract was under seal, written by the vendor, witnessed by his son. The whole purchase-money had been fully paid, and a receipt was given.

Upon such a case specific performance in equity is as much a matter of course as at law; (Hall vs. Warren, 9 Ves., 608; 1 Wh. and Tu. Lead. Cas., 577; 2 Tuck., 460-'61;) so much so that, Lord St. Leonard, in Lumley vs. Wagner, 13 Eng. L. and Eq., 257; 1 De G.; McN. and G., 619, says it is due to this branch of equity that the English people have so high a character for good faith—a faith which, once pledged by legal contract, cannot be evaded nor compensated for by damages.

And, in Virginia, so perfect is your petitioner's right, that had he obtained possession, his equity would have availed at law against his own vendor's legal title. Code of Va., ch. 135, § 20.

To this bill defendant makes many objections.

1st. The war is not over, and the bill is premature.

In answer, it is sufficient to say that hostilities had ceased; the confederacy was overthrown; the government of Virginia at Richmond; had been deposed, and that of Pierpont had taken its place; the courts under the new State government were in operation, and not a man remained in arms against the U. S. Government.

But the contract provided for a deed when payment was made. The bill was filed for that. Possession, which was by contract to be given a month after the war, might be denied until then, but a deed could not be.

2nd. It is said your petitioner did not comply in time. Time was not of the essence of the contract. (2 Tuck. Com., 465; 2 Wh. and Tu. Lead. Cas., 2 pt., 18 et Ly.)

But if it was, it was waived by the acceptance in full, April 18, 1863, by requirement and payment of interest, and of damages, to compensate for the delay in the use of confederate bonds. The failure is waived and fully compensated by interest and damages.

But it is said the drafts were not paid.

168 In reply to this objection raised in the answer, note—

(*a.*) The possibility of dishonor of the bills was contemplated by Bolling, and was secured for.

(*b.*) Time, therefore, was not of the essence of that part of the contract; if it was, it has been waived by Bolling's consent to the defence.

(*c.*) If not waived, how has he been injured? As soon as his consent was withdrawn, your petitioner paid one draft and offered to pay the others.

(*d.*) But Bolling took a security for that by retention of title. He held the land and *engaged* it; no damage has resulted; and his declining to accept payment shows that this is a pretext for non-compliance, not a real objection.

(*e.*) But Bolling had no trouble or expense in the defence. He paid voluntarily to Colwell and Shannon, without notice to your petitioner, who, upon notice, as soon as possible, tenders repayment.

(*f.*) But no harm is done to Bolling. He had all the purchase-money since April 18, 1863; he held all the land; his was a contingent liability for one who was perfectly solvent, and who pays and offers to pay within 90 days after being advised. Bolling requires the defence to be given up.

(*g.*) But, further, the arrangement of April 18, 1863, was merely a lien against liability, and time cannot bar the petitioner in lifting it by payment.

(*h.*) If Bolling objected to compliance, and desired to rescind, he had only to tender a return of the purchase-money. How can he retain that, and yet contend he is released by a delay in discharging this lien, of which, when notified, your petitioner promptly takes measures to relieve him?

4th. It is objected your petitioner fraudulently drew these bills.

The proof does not sustain any such allegation. But if it did, it might hurt the holders, but could not the endorser, who was amply secured: it could hurt neither, for the security was complete.

But how could a successful defence hurt Bolling? Had your petitioner succeeded in establishing he was not bound to pay the bills, that defence would have discharged Bolling, and to discharge him was all he contracted with him to do. Bolling could not insist he should do so by paying what he was not legally bound to pay.

The fraud which debars specific execution must be one inhearing

169 in the contract itself. None is charged. These bills are collateral to and independent of that contract; they created a new debt for the contingent liability, for which Bolling had ample security, and thus there was no bad faith to him.

The truth is, the security given to Bolling was a ground on which Fraser, Trenholm & Co. relied to excuse notice of protest. See the declaration in their suit.

But there was no fraud. Lersner had good ground, and he believed it was so, to draw the bills. He was deceived, and, being so, he wilfully deceived no one by drawing them. At the date of the bills the evidence he had was ample of right to draw. A mistake arising from false information cannot be imputed as a fraud; certainly not by one

who could not be defrauded, and was not, and whose own act alone has produced any the slightest inconvenience to him—not the act of your petitioner; for had Bolling, instead of paying Colwell, Shannon & Co., called on your petitioner to do so, it would have been done before any judgment could have been rendered.

5th. The failure of consideration and inadequacy is urged as an objection.

The evidence shows the price to be paid at the time of the contract was an adequate consideration; and the time of the contract is the date of the test of adjud'ing. 2 Tuck. Com., 425.

The war raged over the section where the land lay. The value in gold of the land was not more than the contract-price then, reduced to gold. Gold was high; land was low. See the evidence.

Mere inadequacy is no reason against specific execution. 2 Tuck. Com., 425; 2 Lomax Dig., 69; 2 Wh. and Tu. Lead. Cas., part 1, 5, 6, 7, 8; Adam's Eq., 79, 84, 86; note 1 Story's Eqr., § 265–67; Garnett vs. Macon, 6 Call, 308–371; 1 Wash., 219; 5 Leigh, 686; 2 Leigh, 149; 1 Molloy, 12; Con. Eng. Ch., 477; 3 Br. Ch. L., 605; 9 Ves., 246.

Your petitioner does not ask now to pay in a depreciated currency; he has paid all, and it was accepted as payment in full, and it was made to buy all Bolling contemplated to invest it in. See Lancaster's deposition supro. Bolling took all your petitioner paid as all he wanted, and without objection; he kept it until the downfall of the confederacy makes his investment of his purchase-money valueless; he took his chance. He cannot now, after two years' trial of his chance, throw the loss upon your petitioner, and take his land, after he found the money valueless. Had the confederacy succeeded, his bargain was a great one. Can he take that chance and save himself by now repudiating it?

170 But it must be remarked that Bolling had the money until the war closed. Lersner lost its use. Bolling had the land; Lersner had no use of it. This was for two years; it might have been for ten years. All the advantage of the bargain was with Bolling, the hazard with Lersner; for, even as to the money, Bolling could have used it to purchase elsewhere—to invest in land. If he invested in confederate bonds, can your petitioner be held to guarantee them to him?

Your petitioner, therefore, insists the bargain was in writing, under seal, without fraud, for a fair price at the time, and fully and satisfactorily performed on his part, and he was entitled to a decree for specific execution of the contract of January 19, 1863; but—

(2.) *But* your petitioner put his right on another ground. He insists the contract was executed, and that Bolling holds the title only as a mortgage in equity, and that your petitioner need only claim to redeem.

If the retention of the legal title by Bolling on the 18th of April, 1863, was only as security for his endorsement, and not as vendor, then a court of equity will not allow him to hold it as vendor now to resist a specific performance. Lersner had a right to demand the title then. Nothing appears to show Bolling would have refused his demand as vendor. He was satisfied. As endorser he desired security, and only that, which Lersner was prepared to give to Branch as the buyer of the bills. Bolling took Branch's plan; he ceased thereby to hold as vendor, and held thenceforth as mortgager. His purchase-money has been paid. He holds no claim for one cent of that. He is endorser for Lersner, and they agree he may hold to secure himself as such.

Your petitioner comes to redeem his land from the lien; to pay the

debt, and get his estate. On this ground a court of equity will not refuse him.

171 The whole doctrine of equitable mortgages by delivery of title-deeds presents a strong analogy here. Your petitioner had a contract which, on the receipt in full from Bolling, he could enforce; an endorsement makes it unavailing, except as payment of a debt, just as a legal title in England is unavailing without the title-deed. The lien is created thereby for the debt in the one as in the other case. (See Russell vs. Russell, 1 Wh. and T. Lead. Cas., 440, and comments.)

Yet the circuit court did refuse a decree for the specific execution of the contract; did refuse a decree to give your petitioner the land on his paying the bills.

(3.) Your petitioner insists the decree is wrong in this, that it was based upon a computation of what confederate money was worth in greenbacks. Now Bolling, in his answer, admits the $47,000.00 in confederate money prior to the 18th of April, 1863, was worth $14,000.00 in gold, which, estimated in greenbacks at 1.33⅓, would be $18,666.66. Then there was paid to Bolling, on the 18th of April, 1863, besides the proceeds of the bills, (which was $27,462.00,) the sum of $3,460.36, which, at 5 for one in gold, would be $692.07 in gold; or, in greenbacks at 1.33⅓, $922.76, and then the sum of $2,300.00; all making the aggregate sum of $21,889.42. The decree is only for $19,708.90.

Your petitioner is, therefore, advised and insists that the decree complained of is erroneous in principle and in its details, and should be reversed and annulled. Wherefore he prays an appeal therefrom for the errors assigned, and others to be assigned at bar; and he will ever pray, &c.

GUSTAVUS LERSNER,
By Counsel.

I, J. R. Tucker, an attorney at law, practising in the court of appeals of Virginia, am respectfully of opinion that the decree complained of in the above petition is erroneous, and should be reviewed in the court of appeals.

April 16, 1869.

J. R. TUCKER.

172 Appeal awarded, bond with surety to be given in the penalty of $1,500, conditioned as the law directs.

W. WILLOUGHBY, *Judge.*

MAY 17, 1869.

To the clerk of the district court of appeals, held at Fredericksburg, Va.

173 In the circuit court of Fauquier County.

VIRGINIA:

Among the records and proceedings of the said court are the following:

Be it remembered that, on the 16th day of October, 1865, Gustavus Lersner, by his counsel, John R. Tucker, sued out of the clerk's office of the county court of Fauquier County a subpœna in chancery against Robt. B. Bolling, returnable to November rules, 1865, of the said court, which was not executed.

And at rules held in the clerk's office of the said county court for the month of November, 1865, the said plaintiff filed his bill against the said defendant, and exhibits therewith, in these words:

Bill.

To the justices of the county court of Fauquier County:

Your orator, Gustavus Lersner, respectfully sheweth to the court the following facts as the ground of his complaint: On the 19th day of January, 1863, a certain Robert B. Bolling, of Fauquier County, contracted with your orator, by a written article of agreement, signed by each of the parties, as follows: That in consideration of the sum of $77,000.00 to be paid by your orator to the said Bolling, in manner hereafter to be stated, the said Bolling agreed and obliged himself to sell to your orator his estate known as Bollingbrook, containing, as per deed from Tidball's executors, 769 acres, and bound himself, on the payment of the purchase-money, to deed the same to your orator in fee, with or without the consent of Mrs. Bolling, with general warranty. The said Bolling also agreed to sell one other tract, known as Ben Lomond, adjoining Bollingbrook, containing by survey 341¼ acres, being the tract purchased by Bolling of T. N. Latham, special commissioner to sell the same in the case of Armistead vs. Armistead, a final decree to be yet rendered, and your orator to be substituted for said Bolling as purchaser, "also all the live-stock now on the farms, farming-utensils, and household and kitchen furniture; the silver-plate of all kinds," &c., &c., excepted. Your orator by said contract agreed to pay to said Bolling, on 1st Feb'y, 1863, $17,000.00, on 1st March, 1863, $30,000.00, and on the 10th of March, 1863, $30,000; in all the sum of $77,000.00, the
174 whole purchase-money as aforesaid. It was agreed between the contracting parties that the said Bolling should use and occupy and cultivate the said farms for his benefit and use without rent or charge, also to use the four mules and ten oxen and ten of the 23 milch cows; but your orator, at his discretion, was to sell 13 of the cows, and all the calves and swine and sheep; said Bolling agreed to take all proper care of the premises and the live-stock, but not to be responsible for losses from an invading enemy or any other source. It was further agreed, "one month, after the termination of the war, the said Bolling is to give up to Mr. Lersner the premises and live-stock reserved, or sooner, at the sole discretion of the said Bolling. R. B. Bolling is only to graze and cultivate to an extent equal to the consumption of his family, laborers, and live-stock." A duplicate copy of this contract, signed and sealed by the parties, and witnessed by Mr. Bartlett Bolling, a son of said R. B. Bolling, is herewith filed as an exhibit and prayed to be taken as a part of this bill, marked "Exhibit of plaintiff A."

Endorsed upon the agreement is an inventory of the live-stock sold: 23 cows, 10 oxen, 4 mules, 81 sheep, 8 hogs, 43 shoats, and 15 calves.

Your orator having made this agreement for the purchase of these fine estates, which he desired to settle upon, prepared to comply with the terms, and, after making large payments, found a balance due for the farms, to raise which he drew three drafts upon Liverpool for £1,200 sterling, and as the proceeds were to be received by the said Bolling, it was agreed by him, at the request of your orator, to endorse the same for your orator's accommodation. Your orator then sold them to bankers in Petersburg, through Lancaster & Co., bankers in Richmond, (this being on the 18th of April, 1863,) and paid to the said Bolling the residue of the purchase-money due per the agreement before referred to. There-

upon the said Bolling gave to your orator a paper, signed by himself, dated April 18, 1863, which recited that he had received of your orator, "at different times, up to this date," $77,000.00, in payment of Bollingbrook and Ben Lomond estates, in Fauquier County, Va., say 1,110¼ acres. The deed to executed for the first tract and a decree authorized for the second, when the conditions mentioned in the contract between Bolling and Lersner, dated Jan'y 19th, 1863, shall be fully complied with and perf rmed." The said paper is herewith exhibited and prayed to be taken as a part of this bill, marked "Exhibit of plaintiff B." That paper was drawn cotemporaneously with an addition to
175 the original contract (Exhibit A) endorsed thereon, and referred to the conditions and terms stated in that addition, and was a part of the arrangement made thereby. The endorsement on the contract recited that said Bolling having at your orator's request endorsed said drafts or bills of exchange for £1,200 in all, bearing the same date with said endorsement, and then provided as follows: Whenever the said three bills of exchange shall be fully paid, with all costs and charges, and the said Bolling shall be released from all liability as endorser, he agrees and obliges himself to convey to Gustavus Lersner the tract of land (Bollingbrook) mentioned in the within, and to authorize the decree for Ben Lormond to be made to said Lersner. No deed or decree is to be claimed until the above-mentioned bills of exchange, endorsed by R. B. Bolling, shall be paid and the said Bolling absolved finally from all liability." This was signed by your orator, and the paper (Exhibit B) was signed by Bolling. The legal effect of this business arrangement was obviously to create a charge in equity upon the lands contracted to be sold to the extent of and for security of the bills of exchange, and as in indemnity to said Bolling against any loss as endorser thereof. In the meantime the said Bolling continued to use and enjoy the lands sold by the contract and in pursuance of its provisions.

The drafts aforesaid having been protested, as will be hereafter fully set forth, your orator deems this a proper occasion to explain the circumstances which gave rise to their existence.

Your orator, though resident during the war in Virginia, had a brother living in New York who was in business. To the firm of which he was a member your orator had made large advances, and with the firm had left large funds for purchase and exportation of articles of commerce to England and elsewhere on account of and for the benefit of your orator. Knowing this, and having need of money to complete the payment to Mr. Bolling, your orator sent to New York to draw thence a part of his funds for that purpose; he received in March, or early in April, 1863, information from the firm in New York that his funds had been invested in produce, &c., and the same had been shipped to Liverpool for your orator's account to Robert Rae & Co., produce dealers. This information he relied on, and had good reason to do so. The war was going on, and communication with New York and with Liverpool was much obstructed, almost cut off; your orator had no means of verifying the information, had he doubted its accuracy, and he repeats he
176 neither doubted it nor had reason to do so. The fund so transmitted to Liverpool, and for which he was further informed he could safely draw, largely exceeded the amount of the three drafts referred to hereinbefore. He therefore did not hesitate to act upon this information, and drew the drafts; of this information on which your orator acted, he is satisfied Mr. Bolling was, before the date of the drafts, by visit to New York, personally possessed. These drafts were 60 days sight-drafts, and the parties holding them were bound to due

diligence. They were drawn before the ports of the confederacy were closed by the rigorous blockade afterwards established. Your orator expected them to be forwarded and paid at once, or if by any accident they should not be, that he would hear of it in reasonable time. This was his personal expectation, and it was according to the usages of commerce. Time passed on, and the drafts were protested, and notice came to said Bolling in the latter part of October, 1863, and to your orator some time thereafter. It appeared that Fraser, Trenholm & Co. were the holders of the draft for £500, and Calwell, Shannon & Co. of those for £300 and £400 respectively. It appears by the protests that the draft for £500 was protested for non-payment Sept. 2, 1863, but no protest for or notice of non-acceptance has ever come to the hand of your orator or of said Bolling, as far as he has ever heard; and whether it was ever presented for acceptance your orator does not know, though it is possible, from a note at the foot of the original protest for non-payment, it was noted for non-acceptance, but no notice of that fact was ever given, as far as your orator knows. But even if it was presented for acceptance, the draft must have been presented early in July, 1863. As to the other two drafts, they were protested for non-acceptance about the 10th of August, and notice of this protest was sent to said Bolling Oct. 19, 1863. When the holders, in the winter of 1863–'4, made demand, your orator thinks in Dec., 1863, he advised with counsel upon the course he should take. The facts were stated, and the cases laid before him, and among them, it may be as well here to say, was the fact that by the failure of the firm in New York, and the absence of funds alleged with the drawees, your orator had lost all hope of recovering what he had left with the said firm. It is not necessary, as your orator is advised, to give the reasons upon which the advice of counsel was based, but it is obvious, when the bills were drawn April 18, 1863, and one never reached England until July, and the others until August, after that date, when notice for non-acceptance in July was received
177 at all, and none for that in August until the latter part of October, when the notice for non-payment of the draft of whose non-acceptance none was given, was delayed from Sept. 2, until November, when, for six whole months after their date, no note of alarm was given to your orator, resting securely upon his confidence in the information he had received, and he by this laches was left to incur a loss which, but for it, he might have avoided. Your orator was advised that unless he could make some fair compromise of the matter, it was a case proper for him to require a legal proof of the diligence necessary to fix his liability. But your orator felt, in making this defence, he could not properly act unless Mr. Bolling, the endorser, was consulted. The defence would avail for one as for the other. But your orator felt unwilling to make a defence, and thus suspend the liability of Mr. Bolling as endorser without his full concurrence. Your orator therefore went to Mr. Bolling, and with him to the office of Mr. J. R. Tucker, his counsel, in whom Mr. Bolling expressed a willingness to confide, and then and there stated to Mr. Bolling that if he was opposed to or objected to your orator's making a defence to these drafts your orator would not do so, but would settle them to the relief of Mr. Bolling. Your orator asked him not to hesitate on his account, but to say what course should be taken. Your orator left Mr. Bolling with his counsel. Mr. Bolling, as your orator is informed, expressed his sense of reluctance to continuing under protest; that it was unpleasant to him to do so, and might injure his credit, but declared he would not permit such feelings to prevent your orator making such legal defence as his counsel should advise, and that if counsel

thought he had such defence as it was proper for him to make, that he did not object, but wished it to be done. But he expressed fears that it might be delayed by suits being postponed. The counsel of your orator advised Mr. Bolling that it was in his power to compel the bringing of suits under the law of Virginia. Your orator charges that Mr. Bolling not only acquiesced in the defence being made, but agreed to take the step advised by counsel, and did notify the holders of the bills to bring suits thereon at once, and authorized the counsel of your orator to act for him (Mr. Bolling) and make the same defence as for your orator. In the meantime, at the request of Mr. Bolling, the said counsel explained to Mr. John L. Bacon, agent of the holders of the bill for £500, the reasons which induced the advice of a defence, and the propriety of Mr. Bolling's uniting in it and not paying the drafts in the face of such defence. Upon the notice of Mr. Bolling
178 to the holders, suits were brought on all the bills, and defence was made. Every effort was made by your orator and his counsel to expedite the cases, and they were continued, notwithstanding, until the fall of the city of Richmond terminated the civil jurisdiction in the courts wherein they defended. During all this period, from Dec., 1863 to April, 1865, your orator charges that said Bolling made no objection to the defence of the suits in question, brought originally by his action as surety upon them, defended by him as codefendant with your orator; he never made or suggested to your orator or his *council* that the defence should be withdrawn and the drafts be paid. The war closed, and the time had come for a compliance on the part of Bolling with his contract. The exact date of the close of the war was difficult of definition, but your orator, upon advice of counsel, decided in June, 1865, to give said Bolling thirty days' notice under the terms of the contract, and without giving up the defence which was made for himself and Mr. Bolling, he had determined, if Mr. Bolling consented, to propose to put the amount of all the drafts in the hands of any one Mr. Bolling would approve as collateral security against his contingent liability. Accordingly, by letter dated June 24, 1865, your orator recited that having paid all the purchase-money upon the contract, and that within 30 days after the close of the war said Bolling had agreed to surrender possession, &c., your orator made formal demand for the surrender thereof, on or before July 25, 1865, and to comply fully with the ageement. And your orator added: "In respect to all matters involved in said contract, or connected therewith, I hold myself ready at all times to comply in such manner as shall meet the full extent of my obligations to you, and as will be proper and right." This letter was delivered to Mr. Bolling June 24, 1865, by Mr. J. R. Tucker, and is filed herewith as an exhibit, marked "Exhibit of plaintiff C." To this letter Mr. Bolling did not reply, but had intimated in a letter to Mr. Tucker that in respect to the contract for the land, he could have no communication, but referred him to his own counsel, thus indicating objections to a compliance with his contract. Your orator learned at that time from his counsel, as a statement made to him by Mr. Bolling, that Mr. Bolling had paid to Caldwell, Shannon & Co. the two drafts for £300 and £400, respectively, but he refused, upon being asked what amount he had paid, to state, declining to say whether he had paid principal, interest, damages, and costs, or how much of each.
Your orator ascertained from Mr. Bolling's counsel in this matter,
179 and the same who is counsel for Caldwell, Shannon & Co., in the suits on the drafts, that Mr. Bolling had paid the plaintiffs, but could not tell what sum he had paid.

It seemed to be proper that a codefendant engaged in a joint defence

with your orator should have apprised him of a purpose to abandon it, but with no notice of any such intention Mr. Bolling did abandon it, and then gave your orator no notice that he had done so, nor when asked in respect to it would give any satisfaction about it. Your orator is advised that his defence to the bills against Mr. Bolling is intact, and might be continued, but he was advised by counsel, and it was according to his original purpose, that if his endorser refused or objected to make a joint defence with him, he would take steps to relieve him by settling the debt. Your orator went soon after hearing of the payment by Mr. Bolling of the drafts held by Caldwell, Shannon & Co. to see the counsel of the holders of the other draft, Fraser, Trenholm &c., and through his counsel negotiated a compromise, by which he paid $2,300.00 in paper currency of the United States, in full of the claim, the amount proposed by the plaintiffs; and has paid all the costs of the defendants in the suit; this will appear by paper filed and marked "Exhibit of plaintiff D." Having thus relieved Mr. Bolling of all responsibility upon that draft, he proceeded at once to relieve him upon the others, and being advised that he was only bound by his contract, and by the facts of the case, to repay to Mr. Bolling what he had paid to Caldwell, Shannon & Co., with interest, he wrote a letter to Mr. Bolling, informing him of the payment of the draft to Fraser, Trenholm & Co., and of his readiness to settle with him (Mr. Bolling) in regard to the other two, "and thus absolve you finally from all responsibility in all of said drafts; when you shall tell me the amount you have paid in these two drafts I shall be ready to absolve you." Your orator then notifies him he shall demand a deed, &c., according to the terms of his contract. The said letter, with acknowledgment of its receipt endorsed, is herewith filed, marked "Exhibit of plaintiff E." This letter is dated Sept. 15, 1865. To this letter Mr. Bolling has made no reply. Your orator has thus made a full statement of the facts connected with this transaction; he has in good faith complied with the original contract by paying the whole purchase-money; he has complied, as far as possible, with his agreement to save Mr. Bolling harmless by reason of his endorsement of the drafts, and is now ready, whenever he shall by his answer fairly disclose what he has paid in taking up
180 the two drafts held by Caldwell, Shannon & Co., to repay him in full; and, further, he is ready, if the court shall, in a view of the case, decree that anything further than what said Bolling has so paid is due by your orator under his contract, to comply fully with his agreement in all respects. Your orator is advised that he has the right in equity to demand a specific execution of the contract of January 19, 1863, by having a decree against said Bolling for the Bollingbrook estate, with its personal property named in the contract, and an order for substitution to his rights under the sale by decree in Armistead vs. Armistead, upon your orator's doing what he is ready to do, and will do, when ordered to pay what will relieve Mr. Bolling from any loss from the drafts held by and sued on by Caldwell, Shannon & Co. It will appear from the contract that the said Bolling is no longer entitled to the possession of the land, and it is a fact that he has gone beyond the license of the contract in cultivation of the land. This year, your orator believes, he has 100 acres in corn, which will make much more than he needs for the consumption of his family, laborers, and live-stock, and is seeding 30 acres in wheat; which is largely more than proper under the contract. But now he is not at liberty to cultivate any part of the land, his license having expired. The court may be called on to restrain him from cultivation, or to take an account of his

profits. Said Bolling has killed much of the stock, though responsible for it and its increase. It is proper to say that your orator has delayed no longer than was possible to press his right under this contract. The court of the county of Fauquier has been very recently organized, and only one term has passed since that at which it did organize; and in the absence of any judge of the circuit court, your orator brings his suit in this court. In tender consideration of all which, and forasmuch as your orator is remediless save in equity, and because any remedy which the law courts would furnish is wholly inadequate, by reason of failing to give to your orator the specific property for which he contracted, your orator prays that Robert B. Bolling be made defendant to this bill, and answer each and every part thereof on oath; that he be required specifically to state the sum he has paid to Caldwell, Shannon & Co. in discharge of the said bills held by them, and the date of payment; the amount of live-stock and increase, and the amount of it killed or sold, or otherwise disposed of by said Bolling;

that said Bolling be required, upon payment of the said sum with
181 interest to him by your orator, to perform specifically his contract of Jan. 19, 1863, by proper deed with general warranty, conveying Bollingbrook, and proper order in respect to Ben Lomond, and for the delivery of the personal property, the live-stock and its increase, (Mrs. Bolling being now dead, her dower will be no hindrance,) and that the court would decree all proper accounts for rents, profits, damages, &c., and would grant such further general relief as consists with equity and good conscience; your orator prays a writ of subpœna, &c.

TUCKER & NOLAND, *P. Q.*

EXHIBIT A.

(A duplicate.)

This memorandum of an agreement entered into this 19th day of January, 1863, between R. B. Bolling and Gustavus Lersner, witnesseth that for and in consideration of the sum of seventy-seven thousand dollars to be paid by the said Lersner to the said Bolling, in the sums, and manner hereafter mentioned, he, the said Bolling, agrees and obliges himself to sell to said Lersner his certain estate known as Bollingbrook, containing, as per deed from Tidball's executors, of record in the clerk's office of Fauquier County, seven hundred sixty-nine (769) acres, and binds himself, upon the payment of the purchase-money, to deed the same to said Lersner in fee, with or without the consent of Mrs. Bolling, with general warranty. He also agrees to sell one certain other tract of land adjoining Bollingbrook, known as Ben Lomond, containing, by plat and survey made by Mr. Norris, three hundred and forty-one and a quarter (341¼) acres, being the same tract purchased of Thomas N. Latham, commissioner to sell under a decree in the case of Armistead vs. Armistead, and purchased by said Bolling, a final decree to be yet rendered, and the said Lersner to be substitued for the said Bolling as the purchaser; also all the live-stock now on the farms, farming-utensils, and household and kitchen furniture, the silver-plate of all kinds, pictures, prints, statuary, clocks, all severed crops, meats now on hand, fowls, carriages with their harness, spring-wagon and harness, saddles and bridles, and negroes excepted. The said Lersner agrees and obliges himself to pay to the said Bolling the sum of seventeen thousand ($17,000) dollars on the first day of February, 1863, a further sum of thirty thousand ($30,000) dollars on
182 the first day of March, 1863, and a like sum of thirty thousand

($30,000) dollars on the 10th day of March, 1863, making, in the aggregate, the sum of seventy-seven thousand ($77,000) dollars. By mutual agreement and understanding between the contracting parties, the said Bolling is to use and occupy the above farms, and cultivate the same for his benefit and use, without rent or charge; also to use the four mules and ten oxen, and ten of the twenty-three milch cows. Should Mr. Lersner desire it, he can, at his discretion, sell thirteen of the cows, and all the calves and swine and sheep. R. B. Bolling agrees and obliges himself to bestow all care on the premises and the live-stock, but is not to be responsible for losses from an invading enemy or any other source. One month after the termination of the war, the said Bolling is to give up to Mr. Lersner the premises and live-stock reserved, or sooner, at the sole discretion of the said Bolling. R. B. Bolling is only to graze and cultivate to an extent equal to the consumption of his family, laborers, and live-stock.

In witness of all the foregoing we, the parties contracting hereunto, set our hands and seals on the day first above written.

R. B. BOLLING. [SEAL.]
GUSTAVUS LERSNER. [SEAL.]

Witness:
BARTLETT BOLLING.

Dndorsement on the foregoing.

Live-stock: cows, 23; oxen, 10; mules, 4; sheep, 18; hogs, 8; shotes, 43–51; calves, 15.

Mr. R. B. Bolling has this day, at my request, endorsed three bills of exchange on Robt. Rae & Co., of Liverpool, respectively for 300 pounds, 400 pounds, and 500 pounds, making, together, twelve hundred pounds, (1,200 pounds.) The said bills are dated Richmond, April 18th, 1863, at sixty days' sight. Whenever the said three bills of exchange shall be fully paid, with all costs and charges, and the said Bolling shall be released from all liability as endorser, he agrees and obliges himself to convey to Gustavus Lersner the tract of land (Bollingbrook) mentioned in the within, and to authorize the decree for Ben Lomond to be made to said Lersner.

No deed or decree is to be claimed until the above-mentioned bills of exchange endorsed by R. B. Bolling shall be paid, and the said Bolling absolved finally from all liability.

GUSTAVUS LERSNER. [SEAL.]

183 Richmond, April 18th, 1863.

Witness:
J. HENRY LOWNES.

Paper filed with the deposition of Josiah H. Lownes.

JAMES PLEASANTS,
Notary Public.

EXHIBIT B.

Rec'd of Mr. Lersner, at different times up to this date, seventy-seven thousand dollars, in payment of Bolliingbrook and Ben Lomond estates in Fauquier County, Va., say 1,110¼ acres; the deed to executed for the first tract, and a decree authorized for the second, when the conditions mentioned in the contract between Bolling and Lersner, dated Jan. 19th, 1863, shall be fully complied with and performed.

$77,000. ROBT. B. BOLLING.

APRIL 18TH, 1863.

EXHIBIT C.

ELMWOOD, *June 24th*, 1865.

R. B. BOLLING, Esq.:

SIR: By the terms of the agreement entered into between you and myself, dated Jan. 19, 1863, for the sale by you to me of your two estates of Bollingbrook and Ben Lomond, and of the live-stock thereon, for which I have paid you in full as per your receipts to me, you did agree and oblige yourself, one month after the termination of the war, the possession of the premises to give up to me; and by the said agreement it was further agreed by you that I should sell certain of the live-stock whenever I wished; and whereas the time for the possession of the said tracts of land and of the said live-stock has arrived, I hereby give you notice that I shall require of you the possession of the tracts of land above mentioned, and all the live-stock, on or before the 25th day of July, 1865, being thirty days from this date, and shall require you to comply fully with all the terms of the said agreement. In respect to all matters involved in the said contract or connected therewith, I hold myself
184 ready at all times to comply in such manner as shall meet the full extent of my obligations to you, and as will be proper and right.

Respectfully,

G. LERSNER.

A true copy. June 24, 1865.

Delivered by me to Mr. Bolling at his house.

J. R. TUCKER.

JUNE 24, 1865.

EXHIBIT D.

Gustavus Lersner, esquire, has paid to us, as attorneys at law for Messrs. Fraser, Trenholm & Company, twenty-three hundred dollars, paper currency of the United States, which is in full of all claims of said Fraser, Trenholm & Company, either against said Gustavus Lersner or against Robert Bolling upon a certain protested bill of exchange for five hundred pounds sterling, drawn by said Lersner on Robert Rae & Company, of Liverpool, and endorsed by said Bolling, on which bill of exchange an action of debt is pending in the court of hustings for the city of Richmond, in the name of said Fraser, Trenholm and Company, against said Lersner and Bolling. The original bill of exchange and the protest thereof were filed among the papers in that suit, but have since been lost or mislaid. The said suit, as soon as the said court of hustings shall be reorganized by the appointment and qualification of a judge and other officers of the same, is to be dismissed by the plaintiffs, upon the understanding that the parties respectively are to pay their own costs incurred therein.

MACFARLAND & HOWARD,
Attorneys for Fraser, Trenholm & Co.

RICHMOND, VA., *Sept.* 7, 1865.

Gustavus Lersner has paid me the costs incurred by the defendants in the above suit.

RO. HOWARD,
Clk. of Richmond Hustings Court.

EXHIBIT E.

ELMWOOD, FAUQUIER CO., VA., *September 15th*, 1865.

Mr. R. B. BOLLING:

SIR: I have paid the draft held by Fraser, Trenholm & Co.,
185 for £500, and am ready to settle with you in regard to the other two held by Caldwell, Shannon & Co., for £300 and £400, which I learn you have taken up, and then absolve you finally from all responsibility in all of said drafts. When you shall tell me the amount you have paid in these two drafts, I shall be ready to absolve you.

And I shall then, having performed all the conditions of the agreement of January 19th, 1863, ask and expect of you a deed for Bollingbrook and an authority for a decree in my behalf for Ben Lomond, according to the terms of said contract and according to your receipt of payment, April 18th, 1863.

GUSTAVUS LERSNER.

(Endorsed on above:)
The receipt of the within notice is hereby acknowledged.
September 15, 1865.

ROBT. B. BOLLING.

And a new subpœna in chancery was awarded and issued against the defendant.

And at rules held in the clerk's office of the said county court for the month of December, 1865, the said new subpœna in chancery being returned executed on the defendant, and he failing to appear, on the motion of the plaintiff, by his counsel, a decree nisi was entered vs. him.

And at rules held in the clerk's office of the said county court for the month of January, 1866, on motion of the plaintiff, by his counsel, the said bill was taken for confessed against the said defendant, and this case set for hearing.

And at a county court held for said county on the 23d day of January, 1866, the defendant this day, by leave of the court, filed his answer to the plaintiff's bill, and sundry exhibits therewith, and the plaintiff, by counsel, filed his exceptions to said answer. And by consent of parties, by counsel, this cause is removed to the circuit court of this county for trial. Said answer, exhibits, and exceptions are in these words:

Answer of defendant.

The answer of Robert B. Bolling to a bill exhibited against him by Gustavus Lersner in the county court of Fauquier.

The respondent, for answer to the said bill, says that he believes the paper filed with the bill as Exhibit A is a dupli
186 cate of the memorandum of an agreement entered into the 19th day of January, 1863, between him and the complainant. He does not admit that the complainant entered into said agreement from a desire to settle on the estates mentioned therein; neither does he admit that the complainant has complied with the terms of the agreement. Of the two estates therein mentioned, Ben Lomond was bought at auction before the war at a fraction over twelve thousand dollars, and Bollingbrook was assessed for taxation at a fraction under fifty thousand dollars at the last assessment of lands previous to the war, between which assessment and the date of the agreement costly and valuable

improvements were put upon it. The two estates which adjoin, and on which there is an elegant mansion, with all the appurtenances of a well-appointed establishment and farm, make certainly one of the best in Virginia. With the stock, farming-utensils, and furniture embraced in the agreement, they cost this defendant seventy-seven thousand dollars in a currency equal to gold and silver, and were estimated by him to be worth that sum. He sold the same for and in consideration of that sum, to be paid by the complain't to him. The sale was for gold, but while the agreement was being reduced to writing, the indulgence was accorded to the complainant of paying by instalments, as mentioned in said exhibit. Notwithstanding that indulgence, the complainant made default. He failed to make real payment of the consideration-money. What he did towards payment was as follows: Defendant's son, John M. Bolling, received treasury-notes of the Confederate States to the amount nominally of forty-seven thousand dollars, and this was all that defendant received from complainant previously to the 18th of April, 1863, though even the last instalment had been payable a month and eight days. Complainant attempted to induce respondent's son to extend the time of payment of that instalment, but the latter refused to extend it, and wrote to respondent, informing him of complainant's default. Thereupon this respondent went to Richmond, saw complainant, and insisted on payment. After his interview with complainant, defendant went to Petersburg, where he received, a day or two after that interview, a letter from complainant, proposing that he should endorse for complainant a note to enable him to get it discounted, and in that way pay the last instalment. At such a proposition this respondent was indignant. His credit without complainant's help would have enabled him to negotiate a loan of confederate money if he had desired to
187 use his credit in that way, but he did not. Respondent regarded complainant's proposition as preposterous, and one that could not be allowed. He speedily returned from Petersburg to Richmond to require payment. In this extremity complainant represented to defendant that he had to his credit abroad funds on which he could draw bills that would be honored, and that, if complainant would endorse the bills, they could be sold, and defendant could at once receive the proceeds. Defendant would not have endorsed for complainant if he had supposed the paper on which his name was asked was mere accommodation-paper; but he supposed complainant's representations as to his having funds abroad on which he could draw to be true, and, confiding in the truth of those representations, defendant was induced thereby to endorse for complainant, on the 18th of April, 1863, three bills of exchange, payable at sixty days after sight, for sums (£300, £400, and £500) making together £1,200, and these bills were sold on the credit of defendant's endorsement, and from the proceeds thereof defendant received, on the day last mentioned, treasury-notes of the Confederate States to the amount nominally of thirty thousand dollars; and when he so received the same he signed the paper filed with the bill, or Exhibit B, which states expressly, and in the most distinct terms, that a deed was to be executed for the first tract, and a decree authorized for the second "only when the conditions mentioned in the contract between Bolling and Lersner, dated Jan'y 19, 1863, shall be fully complied with and performed." This respondent, having lost or mislaid his duplicate of Exhibit A, has not recently seen it, and cannot at present say positively what is endorsed thereon. He believes that complainant's Exhibit B was drawn cotemporaneously with an addition to the original contract (Exhibit A) endorsed thereon; but he does not admit that the effect of the arrange-

ment on the 18th of April, 1863, was merely to create a charge in equity upon the lands to the extent of and for security of the bills, and as an indemnity to respondent against loss as an endorser.

On the contrary, respondent says that when that arrangement was made all that complainant asked as to the time of complying with and performing the conditions of the contract of the 19th of January, 1863, was an extension until the maturity of the bills. They might, by reason of the blockade, be slow to reach England, but complainant undertook that, whenever they did, they should be punctually paid. The understanding at the time of the arrangement was that if the bills should be punctually paid, and respondent thereby released and entirely absolved from all liability as endorser, then what was received
188 from the bills was to be regarded as paid in due time; but there would be default on complainant's part in complying with and performing the conditions of the contract of January 19th, 1863, if the bills should be dishonored, and, by reason of such dishonor, demand should be made upon respondent as endorser. And this has proved to be the case; for the bills were all dishonored in July or August, 1863, and by reason of such dishonor demand was subsequently made upon respondent as endorser.

According, then, to the understanding at the time of the arrangement of the 18th of April, 1863, complainant is, as to the contract of the 19th of January, 1863, on no better footing than he would have been in had he not induced respondent to endorse the bills; on no better footing than he would have been in had the thirty thousand dollars received from the sale of these bills never been received. He was as to that contract in default at the time of the arrangement of the 18th of April, 1833, and his default is not lessened by his untrue representations, or by what has been done in consequence thereof, but is greatly aggravated thereby; the complainant, having at great length endeavored in his bill to vindicate his transactions in the matter of these bills, first in drawing them and afterwards in resisting their payment, this respondent will proceed to answer his allegations and to expose them, though it protract the answer to an inconvenient length. Whether the complainant was in fact, notwithstanding war raged between the two sections, operating in New York, through a firm of which his brother was a member, in the "purchase and exportation of articles of commerce to England and elsewhere," and whether in his "need of money to complete the payment" to your respondent he did actually send a runner to New York through the lines of the contending armies "to draw a part of his funds for that purpose," your respondent does not know, but if it be important to the complainant's case, he ought to be required to prove it by reliable evidence; for it was a strange course of proceeding, and whether he was swindled by his brother's firm, as he alleges, and then deceived by a communication from them that they had shipped produce on his account to Liverpool, on which he could safely draw to an amount exceeding the foreign bills drawn by him, your respondent does not know, though he perceives that the creditors of that firm in New York do not think so, but rather that he conspired with his brothers in that firm to withdraw from their reach the
189 effects of the firm. But while your respondent cannot say whether the said allegation is true or not that the complainant received such a communication, he can and does say that the complainant is wholly unwarranted in alleging that "of this information," &c., "he is satisfied Mr. Bolling was, before the dates of the drafts, by visit to New York, personally possessed." So far from it, while your respond-

ent was in N. Y., he had no motive to inquire into the business connections of the complainant and his brothers, if any; for he had never heard that it was proposed by the complainant to draw bills to raise the money to pay for the land, and never was this suggested until after your respondent's return, and after the failure of the overture to procure your respondent's endorsation of accommodation-notes. From his bitter complaint, when reduced to such a strait, of Major Barbour, a q'rm'r in the C. S. army, disappointing him, with whom he seems at one time to have associated in some capacity, it seemed he relied on drawing funds from him to make the land payments. After endorsing the bills, your respondent received from his son, Dr. Robt. Bolling, of Philadelphia, a communication that the complainant and the firm of his brothers were alike in bad odor in New York. For a long time after endorsing the bills, your respondent heard nothing of them, but at length intelligence came of their dishonor, and when your respondent went to Richmond, late in 1863, he found Fraser, Trenholm & Co.'s agent, Mr. John L. Bacon, possessed of the bill of £500, and demanding satisfaction; he, however, was willing to take the bond of your respondent for what was due, payable after the war, in gold, but he was unwilling to come under such a bond, and demanded of the complainant to relieve him. He pleaded that from the laches of the holders in not presenting the bill for acceptance and giving notice of its dishonor, he was left, as expressed in the bill, to incur a loss which, but for it, he might have avoided.

Seeing that a long time had elapsed since the drawing of the bill, your respondent thought this might be true, but he was distrustful of the complainant after what he had heard from Dr. Bolling. Seeing this, the complainant requested him to have an interview with the counsel whom he was consulting in the matter; in him feeling, as the bill alleges he expressed, a willingness to confide, he sought the proposed interview. By that gentleman, who, he supposed, had looked into the matter, he was told that it was proper the payment of the bill should be resisted. Upon this, lest he might place himself in the
190 wrong by opposing the complainant in making a proper defence, he reluctantly gave in to it; but, lest he should be prejudiced, he exacted from the complainant's counsel a promise to explain to Mr. Bacon, the representative of Messrs. Fraser, Trenholm & Co., why the defence was proper and your respondent should unite in it, and, further, that the suit should be hastened as much as possible. At this time nothing was heard by your respondent that he remembers of suit on the other two bills; but although there do not appear to be the same grounds for resisting payment of the latter as of the former, (it not being pretended that the holders of the same had failed to present them for acceptance, and protest them for non-acceptance, and the fact being that they had sought with extraordinary industry for the drawees, and failing to find any such persons in Liverpool, had presented the bills to Robt. Rea & Co., of London, who refused them,) yet the complainant resisted the payment of them too, and it was supposed that your respondent was willing to make common cause with him in so doing; accordingly (as your respondent learned—see Exhibit T, handed him by the counsel of Caldwell & Shannon—when he came to look into the subject in May of the present year) the complainant's counsel had, in this respondent's name, notified the holders of the bills last referred to to bring suit on them, and as his counsel had accepted service of the summons when it was instituted, so that instead of one suit, (that aforesaid of Fraser,

Trenholm & Co., on the bill of £500, which, though 12 or 18 months had elapsed, turned out to be still pending,) he found himself entangled in a second, of which he had never heard, instituted by Caldwell & Shannon, of Alabama, as holders of the other two bills; and your respondent regretted to find that no explanation had been given Messrs. Caldwell & Shannon (so far as their counsel was informed) of the circumstances and advices under which he become involved in the suit, and which, as above stated, he had been so particular to insist on being made to Mr. Bacon. Finding himself thus involved in litigation over these bills, when he came back to the consideration of this business in May, 1865, after the cessation of the rude shock of arms enabled him to leave his home and family and look after matters elsewhere, your respondent, without imputing to the counsel of the complainant in respect to these suits intentional disregard of his wishes and interest, but from the intelligence received by him from his son in Philadelphia, after endorsing the bills, distrustful about the complainant's fairness in the transaction, felt it to be as well to investigate for himself the
191 nature of the defence in these suits, fearing that the zeal of counsel might obscure his judgment as to the propriety of the defence and the chances of success, and finding him absent from Richmond, (having gone to Albemarle to sojourn, between which and Richmond there were no facilities of communication at that time by mail or otherwise,) accordingly he approached the counsel of the plaintiffs in each case, and explaining his position, about which he had no concealment to make, asked for such development of facts as they might deem it proper to make. From them he received full statements of the facts; he learned that no such house could be found in Liverpool as that of Robert Rae & Co., the drawees of the bills; that to the reference in case of need, the bills had been presented after a vain search for the drawees, and refused; of all which notice had been given with as much dispatch as was to be expected under the circumstances; and, further, in the case of the bills held by Caldwell & Shannon, that after exhausting inquiry in Liverpool, where the drawees were described in the bills to be, search was made in London, where a firm of the name of Robert Rea & Co. being found, the bills were presented to them and by them refused; a letter of explanation of this dealing with these bills held by Caldwell & Shannon, together with copies of the bills and protests which were then shown your respondent, and were delivered to him after he had paid the same, are herewith filed as exhibits, marked "X" and "Y." These revelations strengthened the doubts your respondent had felt about the fairness of the transaction of the complainant in drawing these bills into the conviction that it was a reckless experiment on the part of the complainant, suggested in the extremity of his position, and as the last resort for raising the instalment of $30,000 still unpaid on April 18th, the date of drawing the bills, though due on March 10th, and that the defence was an attempt to turn to the profit of the complainant the supposed laches of the holders of the bills where there was not laches, and where, had there been laches, it would have been productive of no injury to the complainant, whose bills were mere kites to raise money, and not drawn against funds. Under this conviction your respondent felt that the resistance of the payment of these bills to the holders who had taken them in good faith and dealt with them in like good faith was neither creditable nor likely to be successful, and he felt inclined at once to pay them. But, intending to go on in a short time to New York, the theatre of the operations of the complainant's brother, who had, as

he alleged, swindled and deceived him in the transaction, and
192 where he might gather some information pertinent to the inquiry, he reversed his decision. Accordingly he went on to New York about the 1st of June, where found at once that the house there of which the complainant's brothers were members, and is referred to in the bill, was a house of evil notoriety, and had exploded in disgrace about the 20th or 25th of May, 1863, being about one month after the bills were drawn, and long before they could be expected to reach England, and so far from finding, as it is expressed in the bill, that for six whole months after their date "no note of alarm was given" to the complainant, "resting securely upon his confidence in the information he had received, and he, by this laches, was left to incur a loss which, but for it, he might have avoided." So far from finding this, your respondent found that, in July, 1863, (before these bills had all, or perhaps any of them, reached Liverpool, and quite as soon as in the blockaded condition of the country and the limited facilities for sending abroad the bills could have been expected to reach Liverpool; for communication, as stated in the bill, "with Liverpool was much obstructed, almost cut off,") the defendant not only had no reason for resting securely upon his confidence, if really he had ever received information that there were funds to his credit in England, but knew all about the facts of the case; that he was himself personally in New York in said month of July, 1863, in communication with his brothers, partners in the house alledged to have made the remittances, and that he had indeed pocketed what there was of effects of the firm at the expense of their creditors. For a more full exposition of the career of this N. Y. house, and the dealing of the complainant with it than it would be convenient here to set out, exhibit marked "L" is herewith filed and prayed to be taken as part hereof. When these facts were brought to your respondent's knowledge, his resolution was fixed to throw off all connexion with the complainant; and Caldwell, of the firm of Caldwell & Shannon, being at the time in N. Y., and anxious for satisfaction of his debt, your respondent, appropriating a reserved fund, a different use of which would have been of great advantage to him, paid him, on the 3rd of June, 1865, the amount of the two bills, viz, £793 9 7, by bill on Rothschild & Son, London, and afterwards, to their counsel, his fee of $100 of U. S. currency, Caldwell & Shannon remitting damages in consideration of your respondent being an innocent endorser. And your respond-
ent's disposition was to pay the bill of £500; but he was advised
193 by counsel that he could not safely do so to its late holders, as it might perchance have been acquired by some innocent endorser for value under such circumstances as to entitle him to demand the amount of it, as if the same had not been paid the latter, and that it would be well, even if the bill should be found and returned to Fraser, Trenholm & Co., to wait a while till Mr. Trenholm should be relieved of his forfeiture for participating in the cause of the confederacy. This advice your respondent took; and explanation having been made to Fraser, Trenholm & Co.'s agents of the circumstances of his complication in the suit, your respondent, who lived at a distance and beyond mail intercourse, left it to his counsel to settle with those entitled to the bill of £500, when it might be proper, having given a power of attorney to enable it to be done. This exposition of the time and manner of discovering the fraud practiced in drawing the bills and resisting their payment shows the groundlessness of the complaint that "during all this period, from December, 1863," your respondent "made no objection to the defence of the suits in question;" for it shows that he was not possessed of the facts on which he acted until, in May, 1865, he went to

Richmond and gathered the facts in the knowledge of the holders of the bills, and, in June, 1865, to New York, and looked into the career of the complainant's correspondents there and his connexion with them. And your respondent deems it proper to add, if it be objected that he should have improved the interval to look into these transactions, that he was ill circumstanced to do it, living as he did 100 or 200 miles from Richmond, without facilities of travel and without mails, sometimes within the lines of one belligerant and sometimes in the other—at all times liable to visitation from either and of continual dread of it, and frequently suffering by its actual occurrence, with a daughter of ten years and other females in the house to protect, with six sons in the army to look after, and his own neglected business elsewhere pressing on him, whenever he could venture to absent himself from his home. Your respondent has stated that one of the house of Caldwell & Shannon, being in N. Y., and anxious to receive the amount due them, your respondent paid him. It is complained that this was not proper, but "that a codefendant, engaged in a joint defence with" the complainant, "should have apprised him of a purpose to abandon it, but, with no notice of any such intention," your respondent "did abandon it." With the insight he had in June into the conduct of the complainant in respect to these bills, your respondent did not in-

'end to be governed or influenced in regard to the further de-

194 fence of the suits on them by his wishes, and did not therefore feel it to be important to "apprise him of a purpose to abandon it," and being satisfied that Cal'well & Shannon were entitled to satisfaction of the bills they held, and which for two years had been dishonored, with your respondent's name upon them, and which, they told him, had induced them to take them, he thought it very proper to pay the same. And this could not be unjust to the complainant, for if he owed the bills he ought to pay them, and if he did not, he would not be bound to the respondent any more than to Caldwell & Shannon, by his paying them, for it would be done in his own wrong. But it is further complained that your respondent gave "no notice that he had done so," i. e., had abandoned the defence; and yet your respondent, who only paid these bills in June, apprised the counsel of the complainant of the fact on the 24th of the month, which was the first opportunity he had to communicate with him. (For a long time there had *had* been no intercourse between the complainant in person and the respondent.) And it is not true, as alleged in the bill, that your respondent "when asked in respect to it," (the abandonment of the defence,) would not "give any satisfaction about it." The fact is that in responce to the proposal of the complainant's counsel to enter into a conference about the land contract, in respect to which your respondent had sought the advice of others, (thinking it best for the complainant and himself to have different counsellors,) your respondent referred him to his counsel, and when, after that, the complainant's counsel himself came with the notice of June 24th, 1865, your respondent did not feel called on to go into a discussion of matters referred to therein, having already sufficiently indicated his purpose to leave the discussion of them to his counsel. However, your respondent thought it proper to inform and did inform the counsel that he had paid the bills held by Caldwell & Shannon, and also thought it proper, in view of the deception which he did not doubt the complainant had practised upon him, (for he did not believe, with the knowledge of the real facts of the case, he would have advised your respondent that the defence of these suits was "proper,") to say to him that if he had accepted as true the account of these transactions given by the complainant, he would find it wholly unsustained by the facts of

the case. Inasmuch as your respondent had, in consenting to be sued on one of these bills, acted under his advice, he thought it civil to let him see that, while he considered the advice unfortunate, he as-
195 cribed it to his erroneous impressions of the facts, rather than the want of sound judgment. Farther than this he did not feel inclined to go in matters more appropriate for conference between the counsel and his client than the former and this respondent. While your respondent declined going into the discussion of questions suggested in the notice of June 24th, 1865, he ought not to forbear to call attention to the proposition it is recited in the bill it was intended to submit, if encouraged to proceed; for it is an instructive commentary on the fair words with which that notice concludes, that "in respect to all matters involved in said contract, or connected therewith, I (complainant) hold myself ready, at all times, to comply in such manner as shall meet the full extent of my obligation to you, and as will be proper and right." In giving his account of that notice, the complainant avers that, "without giving up the defence which was made for himself and Mr. Bolling, he had determined, if Mr. Bolling consented, to propose to put the amount of all the drafts in the hands of any one Mr. Bolling would approve as collateral security against his contingent liability." It thus appears that he would have proposed to be let into the land and to be let off with $30,000 of the price; to be let off with the bills representing that much of it, so far as the respondent could let him off; your respondent to give up the land, a real security in his own hands, and accept in its stead a personal security, in the shape of a fund in collateral hands, a better for a worse security, and then (as if your respondent cared only for his personal security, and nothing for the honor of the bills and the rights of innocent holders thereof, and therefore he had met "the full extent of (his) obligations to" the respondent, when he provided a security) that your respondent should consent to let him go on with "the defence made for himself and", the respondent, although it was made, as hereinbefore shown, in fraud of the rights of the bill-holders, and although your respondent's name had given credit and currency to the bills, and although your respondent had received the proceeds of the bills. Although the interview of the 24th of June is complained of as not giving "satisfaction," it seems to have had effect. It is alleged that "soon after" it the complainant "went to see the counsel of Fraser, Trenholm & Co., and, through his counsel, negotiated a compromise by which he paid $2,300 in paper currency of the U. S., in full of the claim, the amount proposed by the plaintiff." This, it is alleged, was done because your respondent withdrew from the defence, which your respondent does not understand unless upon the admission
196 that the defence was bad; for, if good, this respondent could not deprive the complainant of the right to make it. The complainant, well knowing from the first the defence to be, as upon investigation it has turned out to be, untenable, felt the necessity of enlisting your respondent in it, lest he might lose the benefit of the contract, should he "suspend the liability as endorser" of your respondent "without his full concurrence." The complainant's address in bringing about an interview between the respondent and counsel, in whom your respondent would confide, was not set in motion by a delicate consideration of the latter's preferances as to the matter of resisting the bills, but by his knowledge of the respondent's right, under the contract, to have the bills paid when they became payable, as much as, before the modification of the contract, to have the last instalment paid on March 10th, 1863, and that if, instead of paying the same, he set up a false defense and kept your respondent under protest and involved in litigation,

it would be a breach of the contract. Hence his anxiety to get the consent of the respondent that the payment of the bills should be resisted, and hence his fraudulent misrepresentation that he had been injured by the laches of the bill-holders; and hence the grave complaint against your respondent for withdrawing from the defence. It is complained that no reply was made to the notice called the "letter" of September 15th, 1865, Exhibit E, sent to your respondent's house to be served on him. After all that had passed your respondent (his counsel, who was with him at the time, so advising him) considered the object to be to use it in the course of the suit that was imminent, and that an acknowledgment of service was all that was expected. But it seems proper now to call attention to the fact that while the complainant therein notifies the respondent that he had actually paid "the draft held by Fraser, Trenholm & Co., for £500," it turns out that he had only obtained a release of the claim of Fraser, Trenholm & Co. to it, (see Exhibit D,) the bill itself not being held by them; paying for the release just about one-half of the amount due on the bill, considering that payment was made in U. S. currency, and sterling was due on the bills; and this Fraser, Trenholm & Co., perhaps, did well enough to take, in their situation, with the bill lost or stolen, and the principal partner of the house, Mr. Trenholm, threatened with confiscation, and where they gave no guaranty against an innocent holder of the bill or the U. S. But had it been so, had it been that, on the 7th of September, 1865,
when he paid them for their release, one-half of what the proper
197 holders of the bill was entitled to, he had paid the bill itself,
and had the complainant then, on the 18th of September, 1865, tendered the amount due on the bills of £300 and £400, (which three bills drawn on the 18th of April, 1863, payable 60 days after sight, and dishonored in July and August, respectively, of 1863, and which, after notice thereof in October, 1863, and demand of payment, had been suffered to lie under protest for the two years, and to be put in suit, in fraud of your respondent as well as the holders, until the rigor of the war relaxed and opportunity was afforded for the discovery of the falsity of the defence,) this would not have been to perform, in the language of that notice, "all the conditions of the agreement of January 19th, 1863," according to the terms of said contract, and according to the terms of Exhibit B, of date April 16th, 1863. For, by the agreement of January 19th, 1863, the last instalment of the purchase was to be paid on the 10th of March, 1863, and by the modification of the agreement made on the 18th of April, 1863, indulgence was extended only until the said bills representing the last instalment should become payable, which happened at least as early as September, 1863. In this state of the case, as the complainant had not entitled himself by the performance of its obligations on his part to the performance of the contract on the part of the respondent, the latter had determined not to make it. But though the confederate treasury notes had turned out nothing to respondent, he was yet willing to account to the complainant for their value in gold as of the time of their receipt that the complainant might not lose by the contract. And when the counsel of the respondent told the counsel of the complainant, to whom the latter had been referred by your respondent for the discussion of the terms of adjustment of the pending questions, that the demand for the specific execution of the contract would not be submitted to, he added that a return of the value in gold of the confederate notes was deemed the proper basis of settlement between the complainant and the respondent. Notwithstanding this the notice of Sept. 15th was afterwards served on your respondent. Your respondent notices the com-

plainant's explanation that "he has delayed no longer than was possible to press his right under this contract," but he sees none of what more needs explanation of the haste with which he is asserting his supposed right. For notwithstanding your respondent, by the terms of the contract, is entitled to the possession of the property for "one month after the termination of the war," and notwithstanding there has been no proclamation of that event by the constituted authorities of the country to this day, but, on the contrary, while the clash of arms has ceased martial law prevails as much as it did before April, as is witnessed in the continual suspension of the writ of habeas corpus, the trials by military commission, the government of States by the military, and the exclusion of all the seceding States from participation in the government of the U. S.; notwithstanding all this, and more than this, appearing by exhibit marked "S," your respondent is summoned to give up the land and other property claimed. Indeed, as long back as June 24, he was required to surrender on the 25th of July; not only when, as before explained, the complainant had not paid one dime of the sterling bills which represented in the contract the last installment, amounting to $30,000, and which your respondent had either paid or was liable to pay, but when this respondent's other residence was in the occupancy of the military and he had no other habitation for his family, in which condition he remained at the institution of this suit; for only a fortnight before that time the military had given it up, leaving it in a condition unfit to be occupied by a family until repaired—facts proper to be mentioned, that it may be seen that in this connexion the question of the termination of the war is not a technical one to him, but of direct practical bearing. Although your respondent is not holding the estates and property embraced in the agreement of January 19th, 1863, under an acknowledgment of accountability to the complainant for the mode of user, he does not admit that the number of acres planted in corn this year was excessive, even in view of accountability under the contract, seeing the difficulties that attended planting operations, and the uncertainty of results, as the facts appeared at the time of planting; nor does he admit that 30 acres is too much to seed in wheat in the eye of the contract; nor that he has killed much of the stock for which he would be accountable if held to the execution of the contract. But until required by your worships so to do, he will not take upon himself to render any account of these things. Your respondent has no personal knowledge whether the allegation is true that the complainant really wishes to acquire these estates to settle on, and that damages at law would not be adequate redress to him for the loss of them, but he does not believe it; for he has regarded him as a speculator, and not a farmer; and as he has never resided in Fauquier, and has no family connexions there, he supposes the allegations was made for the purposes of this suit, and he calls for strict proof of it.

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199 Upon the whole case this respondent insists, first, that this suit was prematurely brought, because at the time it was brought the war had not terminated for one month, if, indeed, it has terminated yet, and on this ground he objects and demurs. Furthermore, he insists, secondly, that the complainant, so far from showing that he has been in no default in not having performed the contract of the 19th of January, 1863, and that he has taken all proper steps towards such performance, failed to comply with and perform the conditions of the said contract in due time, and has not fully complied with and performed the said conditions at any time, whether regard be had to the contract as it stood before or after the arrangement of the 18th of April, 1863. Thirdly, that after being in default for more than two years, his

claim to specific execution is made, not only without any equitable circumstances to justify that claim after such a lapse of time, but made when he has been guilty of gross laches. Fourthly, that he comes before a court of equity, not with clean hands, and showing himself fair and just, but after being guilty of fraud; that even if he can be regarded as free from fraud in other respects, it is quite certain that this respondent was induced by complainant to enter into the arrangement of the 18th of April, 1863, upon the faith of representations which were untrue, and in the confidence of punctual performance of what complainant had no right to believe would be punctually performed. Fifthly, that in view of the change of circumstances, the complainant's claim is hard and unreasonable, and a decree for specific execution of his speculating bargain would be unjust and inequitable. The treasury notes of the Confederate States, received as aforesaid, could not be invested in anything but bonds of the Confederate States except at what seemed a ruinous discount, and being invested in the latter, the same have been lost; and so if those notes could, as of the time they were received, be regarded a valuable consideration, that consideration has failed; and if this defendant were to convey to complainant the lands and other property which are the subject of the contract of the 19th of January, 1863, such conveyance thereof would be without this defendant's having now in place of the same anything of value.

Under all the circumstances of the case, this defendant is advised and insists that a court of equity should not decree specific performance, but should refuse its aid to complainant, and leave him to seek his
200 remedy at law, where a proper measure of damages may be awarded. That measure of damages, this respondent is advised, will be limited to the real value of what complainant has parted with. Respondent files herewith, as an exhibit, marked "Z," a table of the rates of gold compared with the value of treasury-notes of the Confederate States at different times, according to which the depreciation exceeded three to one at the time of receiving the notes, amounting nominally to forty-seven thousand dollars. According to that table, those notes of the nominal amount of $47,000 were worth, when received, only about fourteen thousand dollars. This last-mentioned sum of $14,000, with interest thereon, and the twenty three hundred dollars paper currency of the United States, mentioned in complainant's Exhibit D, with interest thereon, embraces, this defendant is advised, the whole of the complainant's damages; and from those damages a jury might make a deduction on account of the annoyance and other damages sustained by this respondent in consequence of the dishonor of the bills.

Having fully answered, this respondent prays to be hence dismissed with his costs by him in this behalf most wrongfully sustained.

WM. H. PAYNE, JNO. S. MOSBY, P. D.

FAUQUIER COUNTY COURT, *Jan.* 23*d*, 1866.

Sworn to in open court by the defendant, Robert Bolling.

Teste:

WM. A. JENNINGS, *C. C.*

EXHIBIT T.

RICHMOND, *Mar.* 19, 1864.

Messrs. CALDWELL & SHANNON.

GENTLEMEN: As the holders of a draft drawn by Gustavus Lersner in my favor for £400, at sixty days' sight, and dated April 18, 1863, and endorsed by me, upon Robt. Rea & Co., provision dealers, Liver-
201 pool, you are hereby required, a right of action having accrued thereon, to institute suit upon the same forthwith, and prosecute

the same with due diligence to judgement, and by execution, if legally to be obtained. I am endorser upon said draft, and I require this under the code of Virginia, (edition 1860,) ch. 146, § 4.

Respectfully,

R. B. BOLLING,
By J. R. TUCKER, *His Counsel.*

EXHIBIT X.

Copy of letter of Mr. C. Robertson, dated Liverpool, 15th August, 1863, addressed to Vignier, Robertson & Co., of Havana.

I learned from Brown, Shipley & Co., that the bills which you remitted to them were in order, with the exception of three, viz:

1 for £100, Weil, Bro., & Co., on C. Ollerenshaur, Manchester.
1 for £400, Gustave Lersner, Robt. Rae & Co., Liverpool.
1 " £300 do. do.

The former was refused acceptance because it was stated that the drawer had no authority to draw. In the case of the other two bills for £400 and £300 respectively, the drawees could not be found, no such firm being domiciled in Liverpool. It was ascertained that there was a firm of the name of Robt. Rea & Co. (not Rae) in London, and the bills for £700 were sent there for presentation, but, as you will see by the enclosed memorandum, the firm of Robt. Rea & Co., 33 Upper Thames st., return for answer that they don't know the drawer and never had any transactions with him. Messrs. Crow, Willie & Co., believe the drawer to be a respectable man, but he had no authority from them to refer the holders of any bills to them in the case of non-payment. They know Mr. Lersner, but have no business transactions with him.

HAVANA, *September*, 1863.

202 (Copy.) EXHIBIT Y.

[Stamp.]

I hereby certify that the original copy of this protest was this day mailed to Mr. R. B. Bolling, Montgomery, October 19, 1863.

On this tenth day of August, one thousand eight hundred and sixty-three, I, Thomas Keay Hansall, notary public, duly admitted and sworn, dwelling in Liverpool, in the county of Lancaster, and Kingdom of Great Britain, at the request of the holders thereof, did cause due and careful enquiries to be made in all usual and proper quarters for Robert Rae & Co., provision dealers, Liverpool, the persons upon whom the original bill of exchange, whereof a true copy is on the other side, purports to have been drawn, in order to have demanded acceptance thereof, but was unable to discover them or to learn any tidings of them, their place of business or residence; that I afterwards attended at the office of Mr. John Rae, provision dealers in Temple Court, Liverpool, aforesaid, and did exhibit the said bill to him, and enquired whether he thought the said bill intended for him, when he stated that it was not, and he did not know any firm of the name of Robert Rae & Co. in Liverpool, and did not believe there was any such firm in the town; wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest, against the drawer and endorser of said bill, and all others concerned for all exchange, re-exchange, and all costs, damages, and interests, present and to come, for want of acceptance of said bill. Protest 8–6.

Which I attest.

[SEAL.] (Signed) T. K. HASSALL,
Notary Public.

(Endorsed on the above:) No. 1. Richmond, April 18, 1863. Exchange for £300.

203 Sixty days after sight of this my first of exchange, (second and third of same tenor and date unpaid,) pay to the order of R. B. Bolling three hundred pounds sterling, value received, and charge the same to account of—

(Signed) GUSTAVUS LERSNER.

To ROBT. RAE & Co.,
Provision Dealers, Liverpool.

In case of non-payment, to be honored by Messrs. Crow, Wylie & Co., 3 India Building, Liverpool.

(Signed) GUSTAVUS LERSNER.

(Endorsed:) Pay to the order of Caldwell & Shannon.

(Signed) ROBT. B. BOLLING.

Pay to the order of Messrs. Vignier, Robertson & Co., value in account.

(Signed) CALDWELL & SHANNON.

Pay to the order of Messrs. Brown, Shipley & Co., value in account, steamer Alice Vivian.

VIGNIER, ROBERTSON & CO.

(Copy.)

On this tenth day of August, one thousand eight hundred and sixty-[stamped here.] three, I, Thomas Keay Hassell, notary public, duly admitted and sworn, dwelling in Liverpool, in the county of Lancaster, England, at the request of the holders thereof, did cause due and careful inquiry to be made in all usual and proper quarters for Robert Rae & Co., provision dealers, Liverpool, the persons upon whom the original bill of exchange (whereof a true copy is on the other side) purport to be drawn, in order to have demanded acceptance thereof, but was unable to find them, or to learn any tidings of them, their place of business or residence; that I afterwards attended at the office of Mr. John Rae, provision broker, in Temple Court, in Liverpool aforesaid, and did exhibit the said bill to him, and enquired whether he thought the

204 same was intended for him, when he stated that it was not; and he did not know any firm of the name of Robert Rae & Co. in Liverpool, and did not believe there was any such firm in the town. Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest, against the drawer and endorser of said bill, and all others concerned, for all exchange, re-exchange, and all costs and damages and interests, present and to come, for want of acceptance of the said bill. Protest 8–6.

Which I attest,

[SEAL.] (Signed) T. K. HASSELL,
Not. Public.

(Endorsed on the above:) No. 2. Richmond, 18 April 1863. Exchange for £100.

Sixty days after sight of this my first of exchange (second and third of same tenor and date unpaid) pay to the order of R. B. Bolling four

hundred pounds stg., value received, and charge the same to account of—

(Signed) GUSTAVUS LERSNER.

To ROBT. RAE & Co.,
Provision Dealers, Liverpool.

In case of non-payment, to be honored by Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool.

(Signed) GUSTAVUS LERSNER.

(Endorsed:)
Pay to the order, Caldwell & Shannon.
(Signed) ROBT. B. BOLLING.

Pay to the order Messrs. Vignier, Robertson & Co., value in account.
(Signed) CALDWELL & SHANNON.

Pay to the order of Messrs. Brown, Shipley & Co., value in account steamer Alice Vivian.
(Signed) VIGNIER, ROBERTSON & CO.

205 (Copy.)

On the fourteenth day of August, one thousand eight hundred and [Stamp.] sixty-three, I, Henry Cairncross Duncan, notary public, duly admitted and sworn, dwelling and practising in Liverpool, in the county of Lancaster, in England, do hereby certify that the original bill of exchange for three hundred pounds, of which a copy is on the other side written, now protested for non-acceptance, was this day exhibited unto Charles Robertson, of Liverpool aforesaid, merchant, who declared that he would accept the said bill supra protest, for the honor of Vignier, Robertson & Co., the endorsers, holding the said endorsers, and prior endorsers, and the drawer, and all other proper persons responsible to him for the said sum and for all interests, damages, and expenses incident thereto. I have therefore granted this notarial act of honor accordingly. Which I attest.

[SEAL.] (Signed) HENRY C. DUNCAN,
Notary Public.

(Endorsed on the above:) No. 1. Richmond, April 18, 1863. Exchange for £300.

Sixty days after sight of this my first of exchange (second and third of same tenor and date unpaid) pay to the order of R. B. Bolling three hundred pounds sterling, value received, and charge the same to account of—

(Signed) GUSTAVUS LERSNER.

L'pool, 10 Aug., 1863. T. K. H., Not. Pub., apc.

To. ROBT. RAE & Co.,
Provision Dealers, Liverpool.

In case of non-payment, to be honored by Messrs. Crow, Wylie & Co., 3 India Building, Liverpool.

(Signed) GUSTAVUS LERSNER.

(Endorsed :)
Pay to the order of Caldwell & Shannon.
(Signed) ROBT. B. BOLLING.

Pay to the order of Messrs. Vignier, Robertson & Co., value in account.
(Signed) CALDWELL & SHANNON.

206 Pay to the order of Messrs. Brown, Shipley & Co., value in account steamer Alice Vivian.
(Signed) VIGNIER, ROBERTSON & CO.

(Copy.)

On the fourteenth day of August, one thousand eight hundred and [Stamp.] sixty-three, I, Henry Cairneross Duncan, notary public, duly admitted and sworn, dwelling and practising in Liverpool, in the county of Lancaster, in England, do hereby certify that the original bill of exchange for four hundred pounds, of which a copy is on the other side written, now protested for non-acceptance, was this day exhibited unto Charles Robertson, of Liverpool aforesaid, merchant, who declared that he would accept the said bill, supra protest, for the honor of Vignier, Robertson & Co., the indorsers, holding the said endorsers, all prior endorsers, and the drawer, and all other proper persons responsible to him for the said sum, and for all interests, damages, and expenses incident thereto. I have therefore granted this notarial seal of honor accordingly; which I attest.
[SEAL.] (Signed) HENRY D. DUNCAN,
Notary Public.

(Endorsed on the above :) No. 2. Richmond, April 18, 1863. Exchange for £400.

Sixty days after this my first of exchange (second and third of same tenor and date unpaid) pay to the order of R. B. Bolling four hundred pounds stg. value received, and charge the same to the account of—
(Signed) GUSTAVUS LERSNER.
To ROBT. RAE & Co.,
Provision Dealers, Liverpool.

In case of non-payment, to be honored by Messrs. Crow, Wylie & Co., 3 India building, Liverpool.
(Signed) GUSTAVUS LERSNER.

(Endorsed :)
Pay to the order of Caldwell & Shannon.
(Signed) ROBT. B. BOLLING.

Pay to the order of Messrs. Vignier, Robertson & Co., value in account.
(Signed) CALDWELL & SHANNON.

207 Pay to the order of Messrs. Brown, Shipley & Co., value in acct. steamer Alice Vivian.
(Signed) VIGNIER, ROBERTSON & CO.

EXHIBIT L.

Supreme court, city and county of New York.

WARREN ELLIS AND CHARLES W. ELLIS
against
EMIL LERSNER.
CITY OF BROOKLYN,

County of Kings, ss:

EMIL LERSNER, the defendant in this action, being duly sworn, saith that what is herein stated is a just and true account of all deponent's transactions in the firm of John Rea & Co., and with the plaintiffs.

That about the 16th day of October, 1862, this deponent, being possessed of the sum of five thousand dollars, fromed a copartnership with one John Rea, and placed said money in the firm as capital; that the said partnership continued until about the first day of January, 1863, when Ignatius L. Lersner, a brother of deponent's, was admitted as a partner in the firm, both of which businesses were carried on under the firm name and style of John Rea & Co.; and that the said Ignatius contributed the like amount of $5,000 as capital, and had induced one Gustavus Lersner, another brother of this deponent, to lend him, said Ignatius, the sum of forty thousand dollars, which said sum the said Ignatius, from time to time, while in said firm, lent to the copartnership business; that the whole of said money was legitimately used in the carrying on of said business, in the purchase of stock, almost all of which latter was shipped to England to the regular consignees of deponent's firm, Robert Rea & Co., and that deponent's firm on each shipment thereof drew their bills of exchange against the same and on the same, and on the bills of lading received from the ships for same obtained advances thereon here; and deponent avers that it is the custom of most if not all houses shipping goods to England so to obtain advances; that deponent's firm had always paid their bills promptly until the time of the arrest of John Rea, hereinafter mentioned, and should have continued so to do had it not been for such arrest, and the hasty and uncalled for action of the creditors hereinafter stated in closing the business of the said John Rea & Co.;
208 that previous to the 6th day of May, 1863, hereinafter mentioned, when Ignatius L. Lersner retired from the firm, as hereafter stated, deponent's firm had made large shipments to England of bacon, all of which had been bought *and* credit of seven days, which had been paid for, and from the sales of which this deponent and his partners expected, and had a right to expect, that very large gains would be realized; that the goods so shipped previous to the said 6th of May, 1865, were of the value in New York at the time of shipment of $200,000, on which an average of but 75 per cent. thereon was obtained as advances, thus leaving $50,000 on the purchase-price in New York, besides profits which they had a right to expect, as the market quotations in England were largely in excess of prices here; that about the 6th day of May, aforesaid, the said Ignatius Lersner signified his intention or desire of leaving the said firm, as he did not like the connexion of Robert Rea & Co., who were their consignees, and with whom deponent's firm could not well break off, in consequence of the supposed balance in their hands and *there* Robert Rea being the uncle of John Rea, of deponent's firm, and that thereupon an agreement was made between them by which he

withdrew from the same, and he also agreed to continue the loan of forty thousand dollars he had lent the firm, as aforesaid, and his capital of five thousand dollars to John Rea and deponent, who gave their note or due-bill to the said Ignatius for the amount so due him; that deponent's firm had been about the month of April, 1863, instructed and advised by the said Robert Rea & Co. to purchase large invoices of bacon in New York for consignment, promising large returns of profits, and that it was agreed between deponent and John Rea that he, John Rea, should purchase for the firm large quantities of bacon for immediate shipment on the usual terms and custom, which was on seven days' credit, and that John Rea informed deponent that he did purchase from the plaintiffs the goods claimed for in this suit, and also goods of a like nature for others on a credit of seven days, as deponent is informed by John Rea and believes, and that the plaintiffs were then and there informed that the goods were intended for immediate shipment, and that they well knew the same; that deponent's firm intended from the first to obtain advances on the bills of lading received on shipboard for said goods and on bills of exchange *the* would draw against same, and that with the money so raised and with what they could command in New York, to pay for said goods before the seven days' credit had expired,
209 and which deponent's firm could have done; that their stock, fixtures, and capital which could have been controlled in New York was $15,000, and that with the $50,000, which was then supposed to be in the hands of their consignees, and the advances raised as hereafter stated, would not only have rendered deponent's firm solvent, but with a surplus after payment of debts, and the goods of the plaintiffs were bought and shipped in good faith, and the money raised as hereafter stated, with the *interest* of paying for the same, and that deponent is informed by John Rea that no representations whatever were made by him on purchasing said goods of the plaintiffs, although this deponent had nothing whatever to do with the purchase, and that the amount of the goods purchased by deponent's firm from the plaintiffs and others about that time, and on which advances were obtained, was about the sum of $33,000, and that deponent's firm were not otherwise indebted except as herein stated; that on Saturday, the 23d day of May, 1863, deponent had but negotiated advances to the amount of about $23,000, and that on the Monday following he was promised six thousand dollars more, which he then received, and that deponent had been disappointed in receiving all said advances for a day or two, and that deponent wished to make no payments to the creditors until he had obtained his whole amount, and that at that time the seven days' credit had not expired in which to pay for such goods brought of the plaintiffs and those of the other creditors from whom goods had been purchased at same time, although deponent did depart from his purpose in this respect in one instance, as follows: that on Saturday, the 23d of May, aforesaid, while going to receive the advances mentioned, he met Mr. Smith, of the firm of Smith & Arnold, from whom deponent's firm had purchased goods about the same time as those from the plaintiffs, and which were shipped at the same time, and that said Smith begged deponent to let him have a little money, as he wanted the same, being short; that deponent told him of his resolve, but that, on his further representation, deponent let him have the check of deponent's firm for $2,000 on the Bull's Head Bank, which would leave $800 due them, and with which said Smith seemed satisfied; that deponent's firm had not sufficient funds deposited to meet same, as said Smith was told, but that deponent calculated to obtain said advances in time to make a deposit of the amount to meet said check, hav-

ing been promised the same early, but deponent did not receive the same in time to make such deposit, and that when received from Mr. Major, in Exchange Place street, it was in two checks, one of which was for
210 $1,800; that early on Monday morning deponent went to obtain the balance of the advances, and having heard of attachments being issued by a creditor, was afraid then to deposit what he then had, for fear of the same being eaten up in sheriff's fees and expenses, and that on deponent's way down town he again met Mr. Smith, at Mr. Major's office, and informed deponent that their check had been presented and was not good; that deponent thereupon told him the true facts as herein detailed, and why he had not deposited the checks; that deponent had an engagement to meet his brother Ignatius in Fulton street, where they both went, and that deponent, on advising with his brother as to what was best to be done under the circumstances, let said Smith have the said small check of $1,800, on which he obtained the money; that said Smith was apparently satisfied, deponent informing him that he would pay him his balance in a day or two at the furthest, and which deponent fully intended doing the moment he obtained his full advances and collections; that none of the creditors had yet been paid anything, and deponent told said Smith that he would rather not have them know that he had paid *them* on account, as it might excite them to some such foolish course as the creditor issuing the attachment had adopted, and that he intended paying every cent when their accounts became due; that on the Sunday intervening the 23d and 25th of May deponent was married, and contemplated going a short distance in the country with his wife, when the creditors should have been paid their amounts, and which deponent wished to attend to before going, when, to deponent's astonishment, word was brought to him that his partner, John Rea, had been arrested, and that they wanted to arrest deponent also; that deponent was perfectly bewildered at the announcement, and not knowing what his partner had been guilty of, and knowing that he himself was innocent of anything wrong, listened to the advice of his friends to go immediately with his wife for a few days in the country, until the affair could be investigated and settled; and, without any intention of defrauding any one, or avoiding service of any legitimate process, deponent left with but $75 with the intention of returning in a day or two and leaving the funds with his brother, as hereinafter mentioned, to pay the creditors; that in consequence of the attaching of the stores *of the stores* of deponent's firm, and the orders of arrest granted, and the unusual and uncalled-for steps taken by one or two of the creditors of the deponent's firm, and which, as deponent believes, were
211 set in operation by the plaintiffs and one other, this deponent, on the impulse of the moment, placed the said checks so received by him from the said Major in the hands of the said Ignatius L. Lersner, and the whole of the funds raised by him as aforesaid, with the following understanding: That formally the same should be considered a payment on account of the note given by deponent's firm to him, and on the judgment they had consented to give him as security, in case any more of the creditors should insist on attaching said funds and eating up the amount in expenses, at the loss of those who were acting honorably towards deponent's firm, but that in reality said funds were so placed in his hands as then and there understood and agreed between them; that the claims of the creditors should be settled with same, and paid fairly and justly, pursuant to the agreement made with said Ignatius that the loan of his money should still be continued; all the partners then freely believing in their solvency by reason of the matters afore-

said; that this step was taken by deponent as a precaution to protect the fund for all the creditors, and so that the same should not be wasted in law expenses. And although deponent admits his good intentions have been frustrated by the actions of others, he insists that it was the hasty and uncalled-for conduct of the said creditors that superinduced the same in obtaining attachments, orders of arrest, injunctions, &c., as stated, and that the funds obtained and to be obtained before the time of credit had expired would have been sufficient, as aforesaid, to pay the said debts of deponent's firm; that deponent had been away but a few days, and *commenced* his return *at* New Jersey by letter to his brother, who advised him "that they were still after him to arrest him;" that deponent wrote him and his partner that he had nothing to keep away for, and advised payment immediately, as certainly that was all the creditors could desire; that deponent was answered that the matter would be settled in some shape, and was still advised that he would be put in prison if he came on; that deponent then wrote his partner that he would not come on to be imprisoned, as he had done nothing to meet it; that deponent did not take one cent of the funds belonging to said firm with him, and has not since received any of the same, either directly or indirectly, but that on the contrary deponent lost the $5,000 he had *interested* in the business; but while he was away he had to sell whatever articles of jewelry of his wife's and his own to obtain actual necessaries, and that he is now entirely destitute and penniless, and that during the whole time he was in partnership he drew from the concern but the sum of $700 for his
212 own use and housefit; that when the money had given out, deponent was obliged to, and did, return to his home, but that deponent then learned, for the first time, that the said Ignatius L. Lersner had paid the said money so delivered to him by deponent to his brother Gustavus, from whom he had borrowed it as aforesaid; that deponent in no way or manner consented to, knew of, or sanctioned such transfer, and was much mortified *and was much mortified* and disappointed thereat; and that if deponent had thought for a moment that the said Ignatius would have done so, should not have put the money in his hands; that deponent has not seen or heard from his brother Gustavus since, nor does he know of his whereabouts; that deponent has not since received any money from his brothers, or elsewhere, except from the relations as hereinafter stated; that deponent immediately took a situation as a clerk at A. T. Stewart & Co., to obtain an actual subsistence for himself and wife; and that while in such employment, and after he had been home nine months, he was arrested by the plaintiffs in this action; and that he was so arrested but three days before the trial of the suit in the next paragraph mentioned, as this deponent charges and believes, to prevent the defendant in that suit from having the benefit of his testimony; and that deponent has been incarcerated herein for over fourteen months, and is held on it alone; and this deponent solemnly avers that he had no intention at any time of cheating the plaintiffs out of their property or their money; that about the time of the purchase of the plaintiffs, and after they were put on ship the plaintiffs in this action commenced an action against Israel Slocum, the master of said ship, to recover the possession of said goods, and in said action actually replevied and took from the said Slocum 122 boxes of the bacon deponent's firm had purchased from them, which has never been returned to said ship or deponent, and that the value of the same was about $4,200; and that in this suit against deponent the plaintiffs ask that the defendant be compelled to

deliver the same property to them; and that they have arrested deponent under subdivision 3 of section 179 of the Code, for disposing of the same, so that the same could not be taken by the sheriff, and with the intent to deprive the plaintiff of the benefit thereof, when, at the same time, and at the commencement of this action, *that* they had taken the identical property themselves and sold it, and for their own use and benefit; and that the bail required from deponent is security for the amount of said property; and that this action against deponent
213 was not commenced against him until one year after they had taken said goods from the ship aforesaid, and for one year after deponent's firm had parted with their possession, and after they had left their control in the usual course of business aforesaid; that said goods were never demanded of deponent, and deponent had not the slightest idea at the time of shipping the same that the plaintiffs were desirous of obtaining the same. This deponent, therefore, denies, as stated in the affidavit of Charles W. Ellis, on which the order of arrest herein was granted, that in the month of May, 1863, the plaintiffs were the owners of the property mentioned, or that the same is wrongfully detained by this defendant and John Rae, or either of them, or that they or either of them have so disposed of the said property so that it cannot be taken by the sheriff, or with the intent to deprive the plaintiffs of the benefit thereof. This defendant further denies that the said John Rae, or deponent, fraudulently obtained possession of the said property by false and fraudulent representation, and he denies that either of them represented that they were sound, solvent, and responsible, although deponent certainly believed they were so at that time by reason of the matters herein set forth. And this deponent says he never had anything to do with the purchase of said goods from the plaintiffs, but that the same were purchased by John Rae in good faith; but this deponent denies, as he is informed to the contrary by John Rae, that the said goods were sold for said cash on delivery, and with the understanding that the same were not to be removed from the plaintiffs' control until the cash was paid, but that, on the contrary thereof, this deponent is informed by Thomas and Worthington Hoagkinson, whose affidavits are annexed hereto, that the goods so purchased had not all arrived, but that they were to arrive by the Erie Railroad Company's line, and that it is the custom of the said company when said goods arrive to give the plaintiffs and others owning such goods arriving notice of such arrival, and that the goods must not be left more than 24 hours after; that the goods in this suit took two or three days to arrive, a portion coming one day, and more the next, &c.; and that the said Hoagkinsons were delivered such notices by the plaintiffs, so received by them from the said R. R. company, with checks drawn by the plaintiffs to pay the amount of freight, and that the plaintiffs sent one of their clerks with said Hoagkinsons, who were in the employ of deponent's firm, to check the said goods as delivered to them; and that the said clerk of the plaintiffs saw said goods shipped by deponent's employees, or knew they were
214 being shipped, and the plaintiffs' clerk was there for the purpose of checking the weights and marks of the boxes as they were put on shipboard or the lighter; deponent therefore states that the statement in the affidavit of said Ellis that deponent's firm was only to examine said goods in the hands of said railroad company is wholly false and untrue, and deponent denies that the said goods were shipped in great haste, or without plaintiffs' knowledge, or in any other manner than as stated herein, and he denies that they fraudulently obtained possession of the said goods with the intent stated, or otherwise.

And this deponent denies that he has concealed himself in the city of New York, or elsewhere, with the intent to avoid the service of process; on the contrary, deponent went to A. T. Stewart's aforesaid every morning, where he left every night to go to his home, and he made no secret of it whatever. And deponent further saith that, as to the allegations of their insolvency, *that* had their shipments to their consignees of goods previous to the month of May, 1863, been profitable as they had expected, and had a right to expect, they would have been not only solvent, but would have had a large surplus capital; that deponent has been in close custody for near fifteen months, and that since his arrest borrowed from a friend the of fifty dollars, with which he retained D. P. Burnard, esq., to defend him, but that nothing whatever was done for deponent by him; that, after much time and trouble, deponent obtained a consent substituting Hawkins & Cothren as attorneys for deponent's discharge, but without presenting the facts now presented on which to found said motion, and that the money paid said counsel was loaned him by his brother-in-law, William Rea; that R. J. Joachimsen, esq., was then substituted, but deponent not being able to pay anything, said counsel did nothing herein for deponent; that P. W. Townsend was then substituted with A. R. Dyett as counsel, for whom deponent's friends raised a small counsel-fee between them, but that notwithstanding this action has been tried and judgment rendered for deponent, as hereinafter stated, deponent still remains in prison, and that said last-named counsel want more money to proceed further, which deponent is entirely unable to give them; that his friends, who have aided him before, are so circumstanced that they cannot afford to let deponent have any more, or rather they have not got it to advance, and that Mr. E. D. Evans, deponent's present counsel, is working for deponent, wholly without pay or promise there-
215 of, and that deponent is utterly penn*y*less and without even means of living or providing for his wife and child, who are now actually in want of necessaries, and dependant on deponent's mother-in-law for support, who is likewise in very indigent circumstances; that in the month of June, 1865, and in the 13th month of deponent's imprisonment, this action was tried at a circuit court, before Justice Wells and a jury, and that after a full and fair argument the said justice dismissed the complaint of the plaintiff with costs, and that on the 8th day June, 1865, judgment of dismissal of complain*ant* and for deponent's costs was duly entered in this action in favor of the defendant, against the plaintiffs, in the office of the clerk of the city and county of New York, for ; that at the said trial the plaintiffs applied to the said justice for an order staying defendant's proceeding; that the court refused the same, remarking that the defendant should be discharged from imprisonment, and made an order that the defendant should enter his judgment at once, to facilitate his discharge; that the plaintiffs afterwards appealed from said judgment, and filed an undertaking on appeal and to stay execution on a judgment directing the payment of money, and that the sheriff will not discharge this deponent without an order of this court; that deponent's health is much impaired, and that he can have no medical treatment for want of the necessary funds; and that deponent is informed that it will take some years to enable the plainsiffs to go to the court of appeals, as they have announced their intention of doing, the general term of the first district having decided the point herein in an analogous case in deponent's favor; and that deponent, if he lived so long, would still be unable to find bail for the debt, which it is utterly impossible to do; that John Rae and Ignatius Lersner have both been imprisoned, but have both been discharged after much shorter imprison-

ment, while deponent, who has done nothing to merit it, still remains incarcerated; that deponent never learnt until months after the occurrences herein detailed that Robt. Rae & Co. pretended that there was no such or any balances coming to deponent's firm; that deponent's books have been taken away, and that, therefore, he can say nothing more; that all the large capital invested in said concern of John Rae & Co., in a few months was invested in good' consigned to Robt. Rae & Co., and from which little or no return has been had, except the advances received here; and that deponent cannot account for such shortcomings on the part of R. Rea & Co.; that deponent has caused application
216 to be made to John Rea to reswear to the facts contained in the affidavit hereto annexed in this action, but that he has refused so to do; deponent therefore asks that he be permitted to read said affidavit on this motion; it was made by John Rea to move for discharge from arrest in an action brought against him and deponent by the plaintiffs for the same cause of action as is now brought against the deponent, and that judgment was duly entered up in said action in the office of the clerk of the city and county of New York.

E. LERSNER.

Sworn to before me this 28th day of July, 1865.

ORVILLE O. JONES,
Com'r of Deeds.

Supreme court.

WARREN ELLIS AND CHARLES W. ELLIS
against
EMIL LERSNER.

CITY AND COUNTY OF NEW YORK, *ss:*

IGNATIUS L. LERSNER, being duly sworn, saith that he is the party mentioned in the affidavit of the defendant hereto annexed; that he has read said affidavit and knows the contents thereof, and that so far as the same to this deponents the same is in all respects true; that when said defendant placed said money in the hands of deponent by a check received of Mr. Major he, defendant, fully supposed that deponent was going to pay said creditors, and that the same was placed in deponent's hands as a mere precaution to prevent any one creditor from eating up the amount in expenses, to the detriment of the rest; that the deponent at the time fully intended carrying out said arrangement, but that deponent was thrown into prison without any just or reasonable cause, by one or two of the creditors, and, being kept there, deponent became incensed and enraged, and that about said time deponent's brother Gustavus came to see deponent at the prison, very unexpectedly, and demanded and insisted by threats of violence that deponent gave him said money; that deponent had borrowed of him $40,000,
217 which he lent to John Rea & Co.; that deponent at last succumbed and let him have the , fully expecting at the time, however, that the money coming from England would be ample for said John Rea & Co. to settle with their creditors in full; that deponent has often since regretted having parted with said money, by reason of his brother's imprisonment, which is causeless and unmerited; that John Rea & Co., however, really and honestly owed deponent said amount, and that deponent had a perfect right to take said funds and apply the same toward the payment of his claim against them; that the said defendant,

to deponent's knowledge, has always acted in good faith and honestly throughout the whole of the transactions mentioned in the affidavit of Charles W. Ellis, and defendant herein, and that had it not been for the hasty actions of the plaintiffs, and one other of the creditors, all would have been paid; that deponent's sole reason for withdrawing from said firm was a dislike for their consignees, R. Rea & Co., whom deponent thought too slow in making returns for the goods sent them, and that John Rea was unwilling to charge them, Robt. Rea being his uncle; and that deponant's dislike has now been justified for the reason that the immense capital of John Rea & Co. all been sent to them in the shape of goods without any satisfactory returns; that deponent is not satisfied with the statement that the goods were all sold low in consequence of a fall in the market, as the firm had always been led to believe from quotations of the English market that prices were greatly in advance of those here, and that the said John Rae & Co. had been requested by said Robert Rea & Co. to send on goods about the said month of May, or just previous to the same, and that said John Rea fully expected at that time that there was the large balance coming to them as mentioned, and that deponent was never undeceived until word was brought to him while in prison, on advices received from England after his incarceration, that there was little or nothing coming; that deponent was present at the time when the defendants paid Mr. Smith the $1,800 check, and the statement and occurrence in the defendant's affidavit annexed is strictly true.

I. L. LERSNER.

Sworn to before me this 28th day of July, 1865.

JOHN D. BILLINGS,
Not. Public, N. York City.

218 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, or may concern, greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme court of said State for said county, do find a certain affidavit there remaining in the words and figures following, to wit:

[SEAL.]

Supreme court.

WARREN ELLIS AND CHARLES W. ELLIS
against
EMIL LERSNER.

CITY AND COUNTY OF NEW YORK, *ss:*

John Rea, being duly sworn, says that he was a member of the firm of John Rea & Co., and that Emil Lersner, the above-named defendant, was a member of that firm; that on or about the 19th, 20th, or 21st days of May, 1863, the said firm of John Rea & Co. obtained possession of 147 boxes of bacon from the above-named plaintiffs, and for which they had previously agreed to pay the cash on delivery, and that they immediately thereafter shipped 20 boxes thereof on board of the ship Zurich, bound from this port to Liverpool, and 127 boxes of same on board the ship Malta, bound for the same port; and that deponent obtained the bills of lading therefor from the masters of above-named ships respectively, covering all of the said 147 boxes of bacon, on the

22d day of May, 1863, and that he took said bills of lading, together with other bills of lading of a similar character, covering a large amount of bacon that said firm of John Rea & Co. had bought of various other merchants in the city of New York, and attached to said bills of lading said bills of exchange, bills of exchange having been drawn that morning by Emil Lersner, and who signed the firm-name of John Rea & Co. to them, and to the best of deponent's recollection the bills of lading above referred to were drawn in blank by said Emil Lersner at
219 same time, and one of which described the 127 boxes of bacon shipped on the ship Malta, and one of which described the 20 boxes shipped on the Zurich; deponent then took the said bills of lading to the masters and agents of the ships wherein they had shipped bacon and got them signed, and then deponent took said bills of lading and bills of exchange to M. Major, a foreign-exchange broker of this city, with whom arrangements had been made for their sale; that deponent was too late in the day in his arrival at said Major's to obtain the money on them that afternoon, and deponent left said bills of lading and of exchange with Major, and at once went to the store of his firm in 3d avenue, corner 37th street, and saw Emil Lersner, and told him that the money could not be obtained that evening, and deponent told him that the various parties of whom said firm had purchased bacon would complain because they had been promised their pay that day; that prior to deponent's going down town to get the bills of lading signed on the 22d May, Emil Lersner said he would draw checks of the firm to the various parties of whom said firm had purchas'd bacon, and among them Warren Ellis & Son, the plaintiffs, deponent having at that time given him a list of the names of the merchants of whom said bacon had been purchased, and the amount and value of each purchase, and deponent recollects particularly that Warren Ellis & Son's name was mentioned; said Lersner told deponent that morning that he would go down on 'change and see the plaintiffs and others, and give checks for the amount of the respective purchases of them; that when deponent returned to their store that evening, the defendant told deponent he would meet deponent at Major's office in Exchange Place on the following morning, May 23d; deponent (defendant) went to Major's office on the morning of the 23d, and there met defendant at about ½ past 8, and Mr. Major said he could not furnish the money on the said bills of exchange until after 10 o'clock. Lersner expressed considerable disappointment, and said he had given some checks to some of the parties of whom purchases had been made, and that he had checks of his firm in his pocket to pay for the other purchases said firm had made, and that he must get money to meet said checks; and he told Major, if he could not depend upon him for the money by 10 o'clock that morning, he would take the bills of exchange and of lading and draw other bills of exchange on Crow & Wylie, of Liverpool, to attach to the bills of lading, and that he knew where he could sell the exchange and get the money in an hour; and Major told him he would pay the cash or give a check
520 soon after banks opened; that then, about 9 o'clock, defendant Lersner requested deponent to go up town to their place of business and attend to some matters, and he would stay down town and get the money from Major, and then go on 'change and settle with the various parties of whom said purchases had been made. Deponent asked him if he had checks for each of said parties, and he said he had, and that he knew who they all were, and deponent then left him and went up town; that deponent did not see said Lersner again that day until about 5 o'clock in the afternoon, at said firm's place of business in 42d st., and

paid to said Ignatius Lersner; during the week ending May 23, the defendant requested deponent not to depend upon the carts and drays of the firm of John Rea & Co. to haul all the bacon bought of various parties that week, but to hire other cartmen regardless of expense, and hurry the bacon purchased on board such ships as fast as possible; that at about the time of the alleged return of defendant to his residence, 48 First street, Williamsburg, about 15th August, 1863, no intelligence had been received here of the failure of Robt. Rae & Co., of London, and deponent being then and still in correspondence with said Robt. Rae & Co., would have been the first to have rec'd knowledge of their failure, had they failed; that the drafts or bills of exchange drawn on Robert Rea & Co. by deponent's firm against bills of lading or consignments of bacon to them was so near the actual value of the bacon shipped to them prior and up to May 6th, and in fact up to May 23d, 1863, that there was but little if any margins coming to John Rea & Co. after the sale thereof, and nothing near the amount represented by said Emil and Ignatius at the time the latter withdrew from the concern; that John Rea & Co. stopped business in consequence of the defendant taking away and appropriating the proceeds of the said bills of exchange in the manner above stated, and leaving no money in the firm and absconding himself to parts at that time unknown; and that thereupon attachments and orders of arrest were issued against this deponent and said defendant on the 25th day of May, and deponent was arrested and all the property of said firm taken possession of by the sheriff by warrants of attachments; and also on same day an execution was issued upon the judgment of Ignatius Lersner which had been entered that day for $41,814.36; and deponent was at once lodged in Eldridge street jail; deponent at once, the same evening, May, '65, sent over one of his clerks to inform defendant of his arrest, and ask him what it meant; said clerk (Sylvester Stearns) afterwards informed deponent that he saw defendant and told him of the arrest, and that very soon thereafter saw him and his bride get into a carriage and drive away; deponent has been informed that he went to the Pierrepont House and remained there that night; said defendant never called to see defendant after that time; deponent has been informed that the defendant's
224 wedding-tour consisted of his going to Hoboken and remaining there most of the time of his pretended wedding-tour in New Jersey, and that during the time his wife frequently went to her mother's at 48 First st., Williamsburg, and that she went to the office of Martin & Smith, the attorneys who recovered said large judgment; deponent further says that during the connection of defendant with said firm he drew out a much larger sum than $800, and if the books were properly kept they will show the large purchases he made from time to time for his personal benefit, and which were paid for by checks of the firm drawn by him; he was in the habit of drawing money for his private use, and deponent thinks the whole would amount to near $2,000 that was drawn by him during that time; and deponent further says that upon the said shipments of bacon the week ending May 23, and for which bills of lading were rec'd by John Rae & Co., bills of exchange were drawn for some six thousand pounds by said Lersner, the defendant, on behalf of John Rae & Co., and the defendant rec'd from said Major the entire proceeds of said bills of exchange of £6.000; and that the rate of exchange at that time was 160, which should have realized upwards of $40,000 at that rate; and yet the said defendant does not account for more than $29,000 in his affidavit, which deponent has read; deponent says that about the week previous to all of said purchases he had been offered this same bacon, owned by plaintiffs, by one Chas.

Taylor, a broker, at certain rates, and he told his partner, the defendant, that he could buy bacon of Warren, Ellis & Son, these plaintiffs, and defendant afterwards advised deponent to go and make the offer or rate at which it was afterwards bargained for, and the day before the bargain was made defendant was on 'change with deponent, and deponent then there pointed out to him Charles W. Ellis, one of the plaintiffs, who was on the floor of the Corn Exchange at the time, and deponent told him that he was the man who owned the bacon offered through Charles Taylor, the broker, a few days before; and deponent further says that he denies that his said firm was in good credit up to the 25th day of May, 1863; that their checks had been dishonored prior to that time, and they had failed promptly to meet their payments for merchandize purchased for some days prior to that time, all of which was known to defendant; and deponent denies that Worthington Hodgkinson was superintendent of their business, that he did not have charge of their books and was not acquainted with the financial affairs of said firm, except he may have been informed by Ignatius Lersner and the defendant since May 6th, 1863; that said Hodgkinson was not present at the time deponent bargained for bacon from plaintiffs, and never heard a word pass between deponent and plaintiffs; that said firm only had invested $5,500 in their packing-houses and fixtures, and not $15,000, as stated by said Hodgkinson; that the bacon purchased in this market by said firm was marked up half a cent over what it cost here, at the time the bills of lading were drawn, leaving a margin of not over fifteen per cent. instead of 25 per cent. on said cost; that some time in the month of June, 1863, deponent received the letter hereto annexed, marked "A;" deponent is acquainted with the handwriting and signature of defendant, and he knows that same was written by and subscribed by the defendant; and deponent further says that the defendant stated to Smith & Arnold, in deponent's presence, that Ignatius Lersner had not withdrawn any capital from the concern; this was about the time of the last purchase of them about May 16, '63, and deponent says that the defendant was well acquainted with the custom of trade in bacon and other provisions in this market among the provision merchants, and he knew that such custom was cash on delivery; that some months prior to the times herein mentioned the defendant had made large purchases for his said firm of bacon in this market for shipment; and defendant knew that the same custom prevailed at the time these purchases were made; and deponent further says that Emil Lersner, the defendant, did give some orders and directions in reference to the bacon bought of plaintiffs in the presence of deponent at the 3d Avenue store, in the office; Worthington Hodgkinson came into the office at the time said firm was shipping plaintiff's bacon, which was about May 20th, and he inquired of deponent and the defendant how he should mark Warren, Ellis & Son's bacon for shipment, and the defendant replied, "Put any shipping-mark on that you please, but if the boxes have a good shipping-mark on, ship, then, under the original shipping-mark;" and he told Hodgkinson to hurry up and get same shipped as fast as possible; and plaintiff's bacon was shipped under the original mark, "K. & Bro.;" deponent did not pay said Hodgkinson any money to pay expenses, but he received such money, if at all, from the cashier's desk, and he received orders from said defendant in reference to plaintiff's bacon as much as from deponent.

JOHN REA.

Sworn to before me August 3d, 1864.

CHAS. FRASER,
Notary Public, N. York City.

226 Paper A, referred to in the foregoing affidavit, is in these words:

NEW YORK, *Saturday, 6th June*, 1863.

MY DEAR JOHN: I have been waiting patiently for you or anybody else to refute the several articles about me and John Rea & Co., in the different papers, but neither yesterday nor to-day I see a word! What does that silence mean? It would not do for me, of course, to come out against it, but I think it is your duty to speak against it. I hope you will deny all the nonsense in Monday's editions; if you do not I must do it myself. What are the creditors after me for anyhow? Can they make any money out of my body? Surely you know I have nothing else! As long as it is their intention to put me in jail, (and for what?) I certainly shall not show myself to them; but as soon as they give up that foolish idea, and begin to know that I am not worth the board-money it would cost them for me in jail, I certainly *I certainly* will come forward.

Yours, truly,

EMIL.

All which we have caused by these presents to be exemplified, and the seal of our supreme court to be hereunto annexed. Witness Josiah Sutherland, a justice of the city of New York, the third day of January, in the year of our Lord one thousand eight hundred and sixty-six, and of our Independence the ninetieth.

WM. C. CONNOR, *Clerk.*

I, Josiah Sutherland, a presiding justice of the supreme court of the State of New York, for the city and county of New York, do certify that William C. Connor, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our
227 said supreme court, and that the attestation thereof is in due form.

JOS. SUTHERLAND, *Justice, &c.*

Dated New York, January 3d, 1866.

Exhibit S with defendant's answer is in these words:

President's message.

The President to-day transmitted to the Senate a message in reply to a resolution calling upon him to inform that body upon what charges Jefferson Davis is confined, and why he is not brought to a trial. The President encloses reports from the Secretary of War and the Attorney-General, and at the same time invites the attention of the Senate to that portion of his annual message which refers to Congress the question connected with holding of circuit courts of the United States within the districts where their authority has been interrupted.

WAR DEPARTMENT, *Jan.* 4, 1866.

SIR: In the annexed Senate resolution, passed December 21st, 1865, referred to me by you for report, I have the honor to state, first, that Jefferson Davis was captured by United States troops, in the State of

Georgia, on or about the 10th day of May, 1865, and by order of this Department has been and is now confined in Fortress Monroe, to abide such action as may be taken by the Government.

Second. That he has not been arraigned upon any indictment or formal charge of crime, but has been indicted for the crime of high treason by the grand jury of the District of Columbia, which indictment is now pending in the supreme court of said District. He is also charged with the crime of inciting the assassination of Abraham Lincoln, and with the murder of Union prisoners of war by starvation and other barbarous and cruel treatment towards them.

Third. The President deeming it expedient that Jefferson
228 Davis should first be put upon his trial before a competent court and jury for the crime of treason, he was advised by the law-officer of the Government that the most proper place for such trial was in the State of Virginia. That State is within the judicial circuit assigned to the Chief-Justice of the Supreme Court, who has held no court there since the apprehension of Davis, and who declines for an indefinite period to hold any court there. The matters above stated are, so far as I am informed, the reasons of holding Jefferson Davis in confinement, and why he has not been put upon trial.

Fourth. Besides Jefferson Davis, the following persons, who acted as officers of the rebel government, are imprisoned, to wit: Clement C. Clay, at Fortress Monroe, charged, among other things, with treason, with complicity in the murder of Mr. Lincoln, and with organizing bands of pirates, robbers, and murderers in Canada, to burn the cities and ravage the commerce and coasts of loyal States on the British frontier; D. L. Yulee, at Fort Pulaski, charged with treason while holding a seat in the Senate of the United States, and with plotting to capture the ports and arsenals of the United States, and with inciting war and rebellion against the Government; S. R. Mallory, at Fort Lafayette, charged with treason, and with organizing and setting on foot piratical expeditions against the United States commerce and marine on the high seas. Other officers of the so-called confederate government arrested and imprisoned have been released on parole, to abide by the action of the Government in reference to their prosecution and trial for alleged offences on their applications for amnesty and pardon. Among these are G. A. Trenholm, secretary of the treasury; John A. Campbell, assistant secretary of war; James A. Seddon, secretary of war; John H. Reagan, postmaster-general; R. M. T. Hunter, senator; Alexander H. Stevens, vice-president, and sundry other persons of less note.

EDWIN M. STANTON,
Secretary of War.

ATTORNEY-GENERAL'S OFFICE, *Jan. 4th*, 1866.

To the PRESIDENT:

SIR: I have the honor to acknowledge the receipt from you
229 of a copy of the resolution of the Senate of the United States, of date the 21st December, 1865. In that resolution the Senate respectfully requests to be informed upon what charges and for what reasons Jefferson Davis is still held in confinement, and why he has not been put upon his trial. When the war was at its crisis, Jefferson Davis, the commander-in-chief of the army of the insurgents, was taken prisoner, with other prominent rebels, by the military forces of the United States. It was the duty of the military so to take them. They have been heretofore and are yet held as prisoners of war. Though active hostilities have ceased, a state of war still exists over the territory in

rebellion. Until peace shall come in fact and in law, they can rightfully be held as prisoners of war. I have ever thought that trials for high treason cannot be had before a military tribunal. The civil courts have alone jurisdiction of that crime. The question thence arises, where and when must the trials thereof be held? In that clause of the Constitution mentioned in the resolution of the Senate, it is plainly to be seen that they must be held in the State and district wherein the crime shall have been committed. I know that many persons of learning and ability entertain the opinion that the commander-in-chief of the rebel armies should be regarded as constructively present with all the insurgents who prosecuted hostilities and made raids upon the northern and southern borders of the loyal States. This doctrine of constructive presence, carried out to its logical consequences, would make all who had been connected with the rebel armies liable to trials in any States and districts into which any portion of those armies had made the slightest incursion. Not being persuaded of the correctness of that opinion, but regarding the doctrine mentioned as of doubtful constitutionality, I have thought it not proper to advise you to cause criminal proceedings to be instituted against Jefferson Davis, or any other insurgent, in States or districts in which they were not actually present during the prosecution of hostilities. Some prominent rebels were personally present at the invasion of Maryland and Pennsylvania; but all or nearly all of them received military paroles upon the surrender of the rebel armies. Whilst I think those paroles are not ultimate protection from prosecution for high treason, I have thought that it would be a violation of the paroles to prosecute those persons for crimes before the political power of the Government has proclaimed that the rebellion has been suppressed. It follows from what I have said that I am of the opinion that Jefferson Davis and others of the insurgents ought to be tried in some one of the States or districts in which they, in person, especially committed crimes with which they may be charged. Though active hostilities and flagrant war have not for some time existed between the United States and the insurgents, peaceful relations between the Government and the people in the States and districts in rebellion have not yet been fully restored. None of the justices of the Supreme Court have held circuit court in those States and districts since actual hostilities ceased. When the courts are open and all laws can be peacefully administered and enforced in those States whose people rebelled against the Government, when thus peace shall have come in fact and in law, the persons you hold in military custody as prisoners of war, and who may not have been tried and convicted for offences against the laws of war, should be transferred into the custody of the civil authorities of the proper districts to be tried for such high crimes and misdemeanors as may be alleged against them. I think that it is the plain duty of the President to cause criminal proceedings to be instituted before the proper tribunals, and at proper times, against some of those who were mainly instrumental in inaugurating, and most conspicuous in conducting, the late hostilities. I should regard it as a direful calamity if many whom the sword has spared, the law should spare also; but I would deem it a more direful calamity if the Executive, in performing his constitutional duty of bringing those persons before a bar of justice to answer for their crimes, should violate the plain meaning of the Constitution, or should infringe in the least particular the living spirit of that instrument.

I have the honor to be, most respectfully,

JAMES SPEED,
Attorney-General.

Exhibit Z, with answer of defendant, is in these words:

The gold rates during the war.

Having received various letters inquiring the price of gold in Richmond at different periods of the war, we have compiled the following table, which will convey all the information in our possession. It is made up chiefly of the statements furnished to the press some
231 weeks since by Messrs. Lancaster & Co., and Messrs. Wm. B. Isaacs & Co., of Richmond, to Messrs. Barber & Son, Augusta, Ga. From the 1st of November, 1862, we give in juxtaposition with the brokers' figures, the quotations published in two of the daily papers of Richmond, as far as they go. Various discrepancies will be observed in the figures, which we will, of course, not attempt to reconcile, as our object is to present all the available data, and let the parties interested decide for themselves as to correctness of the quotations. It is proper to say that neither Messrs. Lancaster & Co., nor Messrs. Isaacs & Co., vouch for all the quotations furnished by them respectively, as they derived a portion of them from other sources than their own books. We will, whenever it is convenient, furnish any additional information that may be in our possession as to the price of gold during the war:

1861.—MAY TO 1 OCT.	
Lancaster	1 10
Isaacs	1 10
Augusta	1 10
OCTOBER.	
Lancaster	1 12
Isaacs	1 15
Augusta 1 12 *a*	1 15
NOVEMBER.	
Lancaster	1 15
Isaacs	1 15
Augusta	1 15
DECEMBER.	
Lancaster	1 20
Isaacs	1 20
Augusta 1 20 *a*	1 30
1862.—JANUARY.	
Lancaster	1 20
Isaacs	1 25
Augusta	1 20
FEBRUARY.	
Lancaster	1 25
Isaacs	1 25
Augusta, 1st to 15th	1 25
15th to 28th	1 40
MARCH.	
Lancaster	1 30
Isaacs	1 30
Augusta, 1 to 15	1 50
15th to 31st	1 65
APRIL.	
Lancaster	1 40
Isaacs	1 40
Augusta 1 75 *a*	1 80
MAY.	
Lancaster	1 50
Isaacs	1 50
Augusta	1 90
JUNE.	
Lancaster	1 50
Isaacs	1 50
Augusta 1 95 *a*	2 00
JULY.	
Lancaster	1 50
Isaacs	1 50
Augusta	2 00

AUGUST.

Lancaster	1 50
Isaacs	1 50
232 Augusta	2 20

SEPTEMBER.

Lancaster	1 75
Isaacs	2 50
Augusta	2 50

OCTOBER.

Lancaster	1 75
Isaacs	2 50
Augusta	2 50

NOVEMBER.

1st to 6th	3 50
7th to 27th	3 25
Average	3 37
Lancaster	1 90
Isaacs	3 00
Augusta	3 00

DECEMBER.

1st to 31st	3 25
Lancaster	2 00
Isaacs	3 00
Augusta	3 00

1863.—JANUARY.

7th to 15th	3 00
15th to 30th	3 20
Average	3 10
Lancaster	3 00
Isaacs	3 00
Augusta	3 00

FEBRUARY.

1st to 15th	3 20
9th to 10th	3 25
11th to 23d	3 30
25th to 27th	3 40
28th	3 50
Average	3 33
Lancaster	4 00
Isaacs	4 00
Augusta	3 10

MARCH.

2d to 4th	4 00
4th	4 10
5th to 8th	4 50
9th	4 75
10th to 31st	5 00
Lancaster	5 00
Isaacs	5 00
Augusta, 1st to 15th	4 25
15th to 31st	5 00

APRIL.

1st to 13th	5 00
16th	5 25
17th	5 50
21st	5 75
Lancaster	5 50
Isaacs	5 50
Augusta	5 00

MAY.

14th to 20th	5 25
20th to 21st	6 00
25th	6 50
28th	6 00
Average, about	6 00
Lancaster	5 75
Isaacs	5 50
Augusta, 1st to 15th	5 00
15th to 31st	6 00

JUNE.

1st to 4th	6 50
11th to 14th	7 50
15th to 16th	8 00
18th to 30th	8 50
Average	7 62
Lancaster	7 50
Isaacs	7 00 *a*
Augusta, 1st to 15th	8 00
15th to 31st	6 50

JULY.

1st to 9th	7 50
23d ($11?)	8 50
Lancaster	10 00
Isaacs	9 00
Augusta, 1st to 15th	9 00
15th to 31st	8 00

233 AUGUST.

27th	12 00
Lancaster	12 50
Isaacs	13 00
Augusta (?) .....15 00 *a*	10 00

SEPTEMBER.

5th to 15th	12 00
15th to 31st	12 50
Lancaster	13 00
Isaacs 12 00	13 00
Augusta (?)	14 00

OCTOBER.

1st to 15th	12 50
15th to 31st	11 50
Lancaster	14 00
Isaacs	14 00
Augusta, 1st to 15th	13 00
15th to —	12 50

NOVEMBER.

11th	13 00
14th	15 00
20th	16 50
25th	17 00
Average	15 50
Lancaster	16 00
Isaacs .....15 00 *a*	17 00
Augusta, 1st to 15th	14 00
15th to 30th	15 50

DECEMBER.

10th	19 25
12th	18 50
Lancaster	19 00
Isaacs .....19 00 *a*	20 00
Augusta .....20 00 *a*	21 00

1864.—JANUARY.

20th	20 25
234 22d	21 00
Lancaster	23 75
Isaacs .....20 00 *a*	20 50
Augusta .....20 00 *a*	21 00

FEBRUARY.

12th	22 50
25th	28 00
26th	27 50
Lancaster	23 75
Isaacs .....22 50 *a*	25 00
Augusta .....20 00 *a*	21 00

MARCH.

7th	24 00
11th	22 00
16th	21 25
18th to 23d	21 00
26th	20 75
31st	23 00
Average	22 00
Lancaster	24 00
Isaac .....24 00 *a*	24 50
Augusta, 1st	26 00
15th	20 00

APRIL.

1st to 15th	23 00
15th to 30th	21 00
Average	22 00
Lancaster	22 50
Isaacs .....22 00 *a*	23 00
Augusta .....19 00 *a*	21 00

MAY.

4th	20 00
Lancaster	19 50
Isaac .....18 00 *a*	21 00
Augusta, 1st	20 00
15th	18 00

JUNE.

Lancaster	18 00
Isaacs .....17 00 *a*	19 00
Augusta not quoted.	

JULY.

Lancaster	21 50
Isaacs .....20 00 *a*	23 00
Augusta .....18 00 *a*	20 00

AUGUST.

Lancaster	23 75
Isaacs .....22 50 *a*	25 00
Augusta, 1st to 15th	20 00
15th to 31st	20 50

SEPTEMBER.

6th to 11th		23 00
14th		24 00
17th		25 00
24th to 30th		26 00
Average		24 50
Lancaster	22 50 *a*	27 50
Isaacs	22 50 *a*	27 50
Augusta	20 50 *a*	22 50

OCTOBER.

Lancaster		26 50
Isaacs	26 00 *a*	27 00
Augusta, 1st to 15th		27 00
15th to 30th		25 00

NOVEMBER.

Lancaster	27 50 *a*	33 50
Isaacs	27 50 *a*	33 50
Augusta	26 50 *a*	28 00
Isaacs	45 00 *a*	65 00
Augusta	50 00 *a*	46 00

DECEMBER.

Lancaster	34 00 *a*	49 00
Isaacs	34 00 *a*	49 00
Augusta	25 00 *a*	57 00

1865.—JANUARY.

Lancaster	45 00 *a*	60 00
Isaacs	45 00 *a*	60 00
Augusta	60 00 *a*	65 00

FEBRUARY.

Lancaster	45 00 *a*	60 00
Augusta—		
1st		70 00
15th		80 00
20th		100 00
26th		200 00
27th		300 00
28th		500 00
29th		800 00
30th		1,000 00
May 1st		1,200 00

MARCH.

Lancaster	60 00 *a*	70 00
Isaacs	70 00 *a*	60 00
Augusta		58 00

APRIL.

Lancaster to 3d		60 00
Isaacs		60 00

Plaintiff's exceptions to defendant's answer are in these words:

LERSNER *vs.* BOLLING.

The plaintiff excepts to the answer of the defendant this day offered to be filed, for its irrelevant matter, and especially to the Exhibit
235 L, filed therewith, as a record of evidence taken in a court in New York, to which the plaintiff was no party, and in respect to matters wholly foreign to the issues in this cause. And, reserving the right to file additional exceptions, when a copy of the answer is furnished to his counsel, he is willing that the answer be filed subject to the same.

TUCKER & NOLAN, *P. Q.*

JANUARY 23, 1866.

Defendant does not state what amount of money, nor in what currency he paid the drafts due to Caldwell, Shannon & Co., and plaintiff excepts to the answer for that reason.

Jan. 23, 1866.

TUCKER & NOLAN, *P. Q.*

And on the 15th March, 1866, the defendant filed papers in this cause in these words:

List of the land-tax within the district of Wm. E. Gaskins, commissioner of the revenue, in the county of Fauquier, for the year 1860.

Name of owner.	Residence.	Estate whether held in fee-simple for life, &c.	No. of acres.	Name of tract.	Description of the land as to water-courses, mountains, and contiguous tracts.
Armistead Walker estate	Fauquier	Life	249	Ben Lomond	Gap Run.
Robert B. Bolling	Fauquier	Fee	769	Waterloo	Upperville.

Distances and bearing from the court-house.	Value of land per acre, including buildings.	Sum added to the land on account of buildings.	Total value of land and buildings.	Amount of tax on the whole tract at the legal rate.	Amount of tax for county purposes.	Explanations of alterations during the preceding year, especially from whom transferred, and when and how the owner derived the land.
N. W. 21	40 —	500	9,960	39 84		
N. W. 22	65	12,000	49,985	199 94		

The above is a true extract from the land-book of Wm. E. Gaskins, a commissioner of the revenue for Fauquier County for the year 1860.

WM. A. JENNINGS, *C. C.*

236 ARMISTEAD *vs.* ARMISTEAD. } In chancery.

The undersigned, special commissioner, appointed by a former decree entered in this cause, to make sale of the real and personal estate in the decree mentioned, report that on the 6th day of February, 1860, after having first complied with the terms of said decree, they sold in front of Hall & Harper's store-house, in the town of Upperville, Fauquier County, to Robert B. Bolling, the said real estate known as "Ben Lomond," containing three hundred and forty-one and a fourth acres, (341¼,) at thirty-five dollars per acre, which amounts to the gross sum of $11,943.75, and to Elizabeth Armistead the negro boy named Henry, for the sum of $1,601. The said Robert B. Bolling has complied with the terms of sale, and the said Elizabeth Armistead, having an interest in the proceeds of the sale, executed to the undersigned her bond, payable on demand, and Lewis A. Armistead as her security for the purchase-money of said negro slave. Below is a statement of cash deposited. All of which is respectfully submitted.

THOS. N. LATHAM,
JAS. V. BROOKE,
Commissioners.

Clerk's office of Fauquier County court, Feb'y, 1866.

The foregoing is a copy of the report, minus the statement appended thereto, made by the commissioner of sale, on the 12th of April, 1860, in the chancery suit pending in said court, styled "Armistead vs. Armistead's administrators," and which by an order of said court entered on same day was confirmed.

Teste:

JNO. S. BYRNE, *Clerk.*

And on the 5th of April, 1866, depositions on behalf of the defendant were received by the clerk of Fauquier circuit court, under cover, sealed, in these words:

Deposition of Luther R. Spilman, taken on the 29th March, 1866.

237 1st question by defendant's counsel. Were you engaged in buying and selling lands in the early part of 1863?

Answer. I was.

2nd question by the same. How much confederate money would you have given for the estate of eleven hundred acres, sold at that time by Robert B. Bolling to G. Lersner?

Answer. I knew the estate of Mr. Bolling, near Upperville, in Fauquier, well in 1851, and many more years prior thereto. I have not seen it since that date. I suppose it to be more valuable now than then, as there has been a general appreciation of lands in that county from 1851 to 1861. I think that farm would have sold in 1863, in the early part of the year, for one hundred and fifty dollars per acre in confederate money. I know of one farm in that neighborhood, the Rich Henry Carter, called Grassland, less valuable in my opinion than Mr. Bolling's, that was sold for more money than that, as I was informed by the party who sold it. There were four hundred and twenty-five acres in the Grassland farm. I think I could have negotiated a sale of Mr. Bolling's farm in the early part of 1863 at one hundred and fifty dollars per acre. I made some enquiries about it at that time, at the instance of two parties who wanted to buy it, but learning it was not for sale, I ceased making enquiries about it.

3d question by same. Did you not enquire of me if the land had been sold, and state your regret to learn it had been sold, that you would have given two or three times the price it sold for?

Ans. I think I did. I did.

Cross-examined by plaintiff's counsel:

1st question by plaintiff's counsel. When did you make that inquiry of Mr. Jones?

Answer. It was some time in the year 1863; I think in the spring of 1863. I cannot now call to mind the exact time, either the month or the day, though I distinctly recollect the conversation.

2d question by same. Did you say you would give two or three times the price, or which?

Ans. I remarked that I was authorized to invest money in lands for two or three parties who wished to purchase lands in the county of Fauquier, and that I thought I then could have sold that farm for two or three times as much as Mr. Jones told me it had been sold for. I understood it had been sold for some sixty or sixty-five dollars per acre. I do not now remember the precise sum that was named.

238 3d question by same. Did you ever have Grassland to sell as agent, and how long? Did you have any offer for it? If so, how much, and when?

Answer. I had it in my hands two or three months, perhaps longer. I sold it three times; first at fifty dollars per acre, the second time at eighty-five dollars per acre, and the third time a hundred dollars. The first sale was about the middle of June, or early part of it. The two last sales were in September or October; all in the year 1863.

4th question by same. Did you make any other sales in Fauquier? If so, what lands, for how much, and when?

Answer. I sold, in the summer and fall of 1863, Murphy's farm of two hundred and fifty acres, near Warrenton, for $100.00 per acre; Dr. Murray's farm and Col. Murray's, four miles below Warrenton, for one hundred and fifty dollars per acre; Edward C. Marshall's farm, called the Naked Mountain, near Markham Station, for eighty dollars per acre. The three last sales were made in the fall and winter of 1863.

Re-examined by defendant's counsel:

1st question by defendant's counsel. In answer to the 2d question in the cross-examination, you say you remarked, in the conversation with Mr. Jones, you were authorized to invest money in lands for two or three parties who wished to purchase lands in Fauquier. Did you not add that you had kept your eye on Mr. Bolling's estate to invest in it, if he would sell, and that you were sorry he had sold?

Answer. I think I did.

And further this deponent saith not.

L. R. SPILMAN.

Deposition of John Mann, taken 29th March, 1866.

1st question by defendant's counsel. In whose possession was the residence of Mr. R. B. Bolling, in Petersburg, in June and September, 1865?

Answer. In the possession of the commandant of the district of the Nottaway. General Hartsuff and staff occupied it June, July, and August, and part of September. When General Hartsuff left, it was taken possession of by General Gibbon, who occupied it until it was restored to the possession of Mr. Bolling.

2d question by same. When did the U. S. authorities take pos-
239 session of it, and when did they give it up to Mr. Bolling, and in what condition was it when given up to him?

Answer. The military took possession of it on the occupation of the city, the 3d day of April, 1865, and gave it up to him on the 20th day of October, 1865. The dwelling was very much out of repair. During the shelling of the city the building was struck two or three times, and was damaged to a considerable extent by the military authorities while they were in possession of it. It was not in such a condition that Mr. Bolling could have occupied it with his family at the time it was given to him without being repaired.

And further this deponent saith not.

JOHN MANN.

And on the 28th of May, 1866, the plaintiff filed a paper in these words:

I had no concern as counsel with the suit of Fraser, Trenholm & Co. against Gustavus Lersner and Robert Bolling, in the court of hustings

for the city of Richmond, until about July or August, 1864. In August, 1864, a demurrer was filed to the original declaration, (which had been filed early in the year by other counsel,) and I thereupon asked leave to file an amended declaration. With the consent of the counsel for the defendants, John R. Tucker, esq., the case was continued to enable me to prepare the amended declaration, it being understood that when prepared it should be handed to Mr. Tucker for examination, and that if he thought proper to demur to it, the demurrer should be taken up and argued on some day in the ensuing term, and that the cause meanwhile should retain its place on the docket; accordingly, on the 3d of November, 1864, as appears by the record, the amended declaration was filed in court, demurrers to the original and amended declaration and to each court thereof put in, and the questions arising upon the demurrers fully argued. The court took time to consider of its judgment, and the case remained in that condition until after the matter in controversy in the cause was settled by a compromise made between the parties, by their counsel, which occurred in the summer of 1865. Indeed, nothing further has been done in court in the cause until the present day. The compromise included an agreement that the suit should be dismissed, the parties respectively paying their own costs. It is intended that this dismission shall be entered at the next term of the court. At the time the demurrer was agreed as aforesaid, the original bill of exchange and protest were, to the best of my recollection, 240 filed with the other papers of the cause. It is certain that they were, at a period previous to that, among those papers. I have no recollection of having withdrawn them myself, nor of having seen them since the day of the agreement aforesaid, and my impression for a long time was that they were in the hands of the judge, along with the other papers. Having learned that they were not to be found among the papers which the judge had in his hands, I am unable to form a conjecture what has become of them.

N. P. HOWARD.

MAY 11, 1866.

(Endorsed on the above:)

I hereby consent that the statement on the other side, of Mr. N. P. Howard, may be ready in cause of G. Lersner vs. R. B. Bolling pending in the circuit court of Fauquier, subject to all just exceptions.

May 11th, 1866.

JAMES ALFRED JONES,
Counsel for R. B. Bolling.
TUCKER, *P. D.*

And on the day last named, viz, the 28th May, 1866, other depositions on behalf of the plaintiffs were received from J. R. Tucker, esqr., in these words:

Deposition of Robt. A. Lancaster, taken 10th May, 1866.

1st question by Mr. Tucker for plaintiff. Do you know anything of a negotiation between the plaintiff and defendant in respect to the payment of the purchase-money upon land sold by defendant to plaintiff about the 18th day of April, 1863? If so, state fully all that you know about it.

Answer. I do; about that time Mr. Bolling, the defendant, came to

my office and asked if Mr. Lersner, the plaintiff, was in the city. Upon my informing him that he was not, but had left a message that he would return the next day, or in a day or two, he expressed surprise that Mr. Lersner was not in the city to comply with an engagement to meet him at my office at that time for the purpose of settling for the farm purchased of him. During the conversation that I had at that time with Mr. Bolling, he informed me that Mr. Lersner had made a proposition to him, which he considered very rediculous, to endorse sterling
241 bills or notes which were to be sold for the purpose of settling for his own land. He left a message with me for Mr. Lersner, to the effect that if he did not comply with his engagement in a short time, he would consider Mr. Lersner as wishing to cansel his contract for the farm. Mr. Lersner came to the city the next day and asked me if Mr. Bolling was in the city, informing me that he come for the purpose of settling with him, and asked me at what rate I could sell some sterling bills for that purpose. I asked him if the bills were to be endorsed by Mr. Bolling, and to the best of my recollection, upon my telling him that Mr. Bolling had said that he had applied to him to endorse the bills, he said there must be some misunderstanding about it; that he had not made such a proposition. I then told him at what price the bills could be negotiated if properly endorsed or secured. He told me they could be secured by a deed on the farm which he had purchased of Mr. Bolling. He thereupon authorized me to negotiate the said sterling bills. While I was attempting to do this, Mr. John Branch, of the firm of Thos. Branch & Sons, came into my office and asked if I had not such bills for sale. The result of the negotiation between us was an offer on his part to purchase the bills, to be secured by a deed on said farm. Either at that time or at a subsequent interview between Mr. Branch and myself there was some disagreement in regard to the mode of settling for the said bills in the event of there being returned dishonored. As to the nature of the disagreement, I am unable to speak precisely. At that point in the negotiation when I informed Mr. Bolling that I was about negotiating the bills to be secured as aforesaid, he said that to save trouble he would endorse the bills himself and retain the title to the farm. I then negotiated the bills with Mr. Bolling's endorsement and paid to him a sum of money as directed by Mr. Lersner.

2d question by Mr. Tucker. In your negotiation with Branch of these drafts to be secured upon the land, who was to endorse them?

Answer. My recollection is that they were to have been drawn either to the order of Mr. Lersner or to Thos. Branch & Sons.

3d question by the same. Describe these drafts of which you speak.

Answer. They were drawn in the usual form of sterling bills in sets of three, first, second, and third, on Messrs. Robt. Rae & Co., Liverpool, at sixty days after sight. They were for three hundred pounds, (that is, the first set,) four hundred pounds, (that is, the second set,) and
242 five hundred pounds, (that is, the third set,) in all twelve hundred pounds. The date of the sale was the 19th of April, 1863, and the date of the bills was, I think, the day before.

4th question by same. Was Mr. Branch present when Mr. Bolling agreed to endorse?

Answer. I do not remember; my impression is that he was.

5th question by same. What were the proceeds of the drafts?

Answer. Twenty-seven thousand six hundred dollars in confederate money. Our commissions were $138, making the nett proceeds twenty-seven thousand four hundred and sixty-two dollars.

6th question by same. What amount did you pay to Mr. Bolling, and how?

Answer. We paid him an item of $172.36 (one hundred and seventy-two 36 dollars) of interest, and thirty thousand seven hundred and fifty dollars, all in confederate money, and we sold him on the same day thirty thousand dollars of Confederate States bonds at 102½.

7th q'estion by same. Can you tell what was the balance due to Mr. Bolling of the purchase-money at that time?

Answer. I cannot.

8th question by same. What was the price of confederate bonds about the 10th of March, 1863?

Answer. The price at that day was par or 100.

9th question by same. Did Mr. Bolling endorse those bills at the request of Mr. Lersner, or did he do it upon his own suggestion?

Answer. Upon his own suggestion. I did not hear Mr. Lersner make any such request.

10th question by same. Was the negotiation between you and Mr. Branch complete before Mr. Bolling made this suggestion; that is, were the drafts sold and an order for the payment of the proceeds given before Mr. Bolling came?

Answer. My recollection is that it was; but this difficulty before mentioned was still pending at the time Mr. Bolling made a proposition to endorse the drafts himself. My recollection is that when Bolling came in I informed him that I had negotiated the bills, and that it was while he was in my office Mr. Branch came in and raised some question—I don't remember what—in regard to their settlement in the event of their being returned dishonored, and I think it was during the discussion of
243 that point that Mr. Bolling agreed to endorse the sterling bills and retain the title to the farm as his security.

11th question by same. State what is your business now and what it was at that time.

Answer. At that time I was a stock-broker, and now we are bankers and brokers.

Cross-examined:

1st question by Mr. Jones for defendant. I understood you to say that Mr. Bolling seemed vexed at the proposition about endorsement, whatever it was, which he said Mr. Lersner had made to him. Did I understand you correctly?

Answer. You did.

2d question by same. It seems you paid the proceeds of the drafts to Mr. Bolling, and a larger amount than the proceeds. Do I understand that you were a medium through whom Mr. Lersner made payments to Mr. Bolling on account of his purchase?

Answer. Only in that instance. As well as I remember, Mr. Lersner had an accou't with us, and he would frequently give orders on us in the settlement of his business matters.

3d question. You were asked by question 7th on your examination-in-chief if you knew the balance due on the land purchase, which made me infer that you had some acquaintance with the state of the accounts between the parties. Have you not forgotten a fact in saying that this is the only instance in which you made payments for Mr. Lersner to Mr. Bolling, and have you not the means of ascertaining the exact fact in the matter?

Answer. There are on our books no other charges against Mr. Lersner for money paid to Mr. Bolling either prior or subsequent to 18th and 19th April, 1863.

4th question by same. Do you know that between the time of Mr. Bolling's first conversation with you, in which he spoke of Mr. Lersner's rediculous proposition to endorse for him and the time of the second conversation, in which Mr. Bolling agreed to endorse these sterling bills, that there was no interview between Mr. Bolling and Mr. Lersner on the subject of his, Mr. Bolling's, endorsing these bills?

Answer. None that I know of. Further this deponent saith not.

RO. A. LANCASTER.

244 *Deposition of Josiah H. Lownes, taken 10th May, 1866.*

1st question by Mr. Tucker, for plaintiff. Look at the paper marked "A," now shewn you, and the writing endorsed thereon, signed Gustavus Lersner, and the attestation in your name, and say whether the signature is yours, and whether you witnessed the paper.

Answer. Yes, sir; the attestation is mine, and the handwriting of the endorsement is also mine; that is, I wrote the endorsement and attested the signature of Mr. Lersner.

2d question by same. When was that endorsement made, and do you know anything of the drafts to which it refers?

Answer. On the 18th of April, 1863, as appears by the date on the paper itself; and I know that such drafts were made and passed through our office, by seeing entries on the books. I sometimes sign my name J. Henry Lownes.

And further this deponent saith not.

JOSIAH H. LOWNES.

(Paper A mentioned in above depositian is Exhibit A, with plaintiff's bill.)

And on the 9th of June, 1866, other depositions on behalf of the plaintiffs were received under cover, sealed, in these words:

Deposition of Owen T. Holmes, taken 2d June, 1866.

1st qestion. Do you know Gustavus Lersner, the plaintiff in this suit?

Answer. I do.

2d question. Did you go with him to Baltimore upon any occasion? If so, when and for what purpose?

Answer. I went to Baltimore with him in December, 1862. I went upon my own business. We casually met. I was introduced to him by Mr. Bentley; Mr. Lersner handed me a large amount of money, about $200,000, which I handed back to him the same day at the counting-house of Daniel Miller & Co., in Baltimore, the most of it in dfts. of large amount on New York, the balance in Virginia and other State bonds.

3d question. Do you know what was done with the money before returning to Leesburg?

Answer. Some $30,000 was invested in the firm of John W. Rea & Co., New York, and $35,000 more was invested by the same firm
245 in provisions, consigned to the house of Robert Rae & Co., Liverpool, and $10,000 of Virginia bonds were brought back to Virginia.

4th question. Did you start a second time in company with said Lersner, and who else was in company? State where to, when it was, and what was the object of the trip.

Answer. I did start a 2nd time with Gustavus Lersner; R. B. Bolling was in company; the object of the trip was to go to New York to adjust some money matters between Bolling and Lersner; it was in March of 1863.

5th question. Did you make the trip; and, if not, what prevented it?

Answer. We did not make the trip. Lersner was turned back by the military in Maryland; Mr. Bolling was allowed to go on; Lersner and I returned.

6th question. Did you subsequently go to New York? State when, and for what purpose.

Answer. I went to New York 2 or 3 days thereafter, with an order on John W. Rea & Co. for some 10 or 15,000$, in favor of Lersner.

7th question. Did you get the money; if not, why?

Answer. I did not get it, because they did not have it; they had made a shipment to Liverpool of the $35,000 worth of provisions consigned to Robt. Rea & Co.

8th question. Did John W. Rea & Co. send any message by you to Gustavus Lersner in reference thereto?

Answer. Ignatius Lersner, of the firm of John W. Rea & Co., told me to tell Gustavus Lersner that they, John W. Rea & Co., had made the consignment of provisions to Robt. Rea & Co., of Liverpool, and Gustavus Lersner could draw on them (Robt. Rea & Co.) for the exchange.

9th question. Did Ignatius Lersner state the amount for which Gustavus could draw?

Answer. He did not state the amount, but signified that the amount of the order held by me could be drawn.

10th question. Are you sure that Robt. Rea & Co. lived or did business in Liverpool?

Answer. I am, and more than once.

11th question. Did you deliver the message verbally to Gustavus Lersner; if so, when?

Answer. I delivered it to him immediately upon my return home, in March, 1863.

12th question. Did you state to Gustavus Lersner that Robt. Rhea & Co. was the firm upon which he (said Gustavus Lersner) should draw, and that they did business in Liverpool?

246 Answer. I did.

13th question. Was this message from Ignatius Lersner to Gustavus Lersner given to you at the counting-house of John W. Rea & Co., and upon the presentation of the order for $10 or $15,000 referred to?

Answer. I was.

14th question. In answer to 3rd interrogatory, you say Lersner handed you $200,000, and that you returned it to him. Say why it was he handed you this money.

Answer. Lersner was going to pass through the Federal lines. Not being acquainted with the authorities, he was afraid of being searched, and therefore gave it to me.

15th question. You say that part of this money, $30,000, was invested in the house of John W. Rea & Co., and $35,000 was invested by said firm in provisions, which was shipped to Robt. Rea & Co. of Liverpool. State how or from whom you derived this information.

Answer. I was informed by the firm of John W. Rea & Co. and by Gustavus Lersner that $30,000 was invested in that firm, and by Igna-

tius Lersner (of the firm of John W. Rea & Co.) of the shipment to Liverpool.

Further this deponent saith not.

OWEN T. HOLMES.

Deposition of Robt. Bently, jr., taken 2d June, 1866.

1st qestion. Were you present at the office of Lancaster & Co. at the time of the payment of the balance of the purchase-money by Lersner, the plaintiff, to Bolling, the deft., and the negotiation of the defts. drawn by Lersner and endorsed by Bolling? If so, when was it, and who were present?

Answer. I was at the office of Lancaster & Co. at the time the payment was made—about the 20th of April, 1863. I was in the front room. Messrs. Bolling, Lersner, and Lancaster were in the private room.

2d question. What occurred between Bolling and Lersner as to the amount to be paid, and what did Bolling insist on in the settlement?

Answer. When they returned into the front room, Mr. Lersner remarked to me that he was going to have trouble, he feared, with Mr. Bolling. I asked him why he thought so. His reply was, Mr. Bolling not only contends for the interest, but the difference in what the bonds were worth on the 10th of March and the present time.
247 I told him it was too small a matter to talk about; to go and pay him; it was justly due Mr. Bolling. He (Lersner) walked to Mr. Lancaster's desk. Mr. Bolling then came to me and said, Well, sir, as I told you, I am going to have trouble with Mr. Lersner. I told him Mr. Lersner had just stated to me the point in dispute, and that he was prepared to settle. The parties left the front room; upon their return, Mr. Bolling approached me and said the "matter has been satisfactorily arranged."

3d question. Did you tell Bolling, or did Bolling tell you, what the matter in controversy was?

Answer. Bolling told me, as Lersner did, that the difficulty was in the price of the bonds between the two dates. And further deponent saith not.

ROBT. BENTLY, JR.

J. R. TUCKER, being duly sworn, deposeth and saith:

Deponent is an attorney at law, and was living in the city of Richmond in the years 1863, 1864, and 1865, until the month of March of the latter year. In the month of December, 1863, or January, 1864, G. Lersner, the plaintiff in this cause, came to see me as his counsel, and laid before me copies of protests of the drafts referred to in the proceedings in this cause, and asked my advice in respect to his liability upon them. He told me that he desired my opinion, but was unwilling, as Mr. Bolling, the defendant in this cause, was the endorser upon the drafts, to take any step in resistence of payment thereof without his sanction. I suggested, or he did, that Mr. Bolling should come to my office upon the business. I could not say whether he had a valid defence to them, as I could not know what would be the evidence upon the trial as to due diligence by the holders in the presentment and protests of the drafts. But, from the papers showed me, enough appeared for me to say that without proof of such diligence it did not seem clear that the liability of the drawer and endorser had been fixed, and unless the parties would settle the matter upon something like fair terms, I advised him to de-

cline to pay, and stand suits thereon, especially as he had received in confederate currency but a small proportion of what he would have to return in like currency if he paid it at the time he advised with me. The laches of the parties holding the drafts was apparent, unless some adequate excuse was proved by them. According to my suggestion, Mr. Lersner and Mr. Bolling came to my office, and I stated to Bolling what I had advised Mr. Lersner, and that Mr. Lersner was unwilling
248 to do anything suspending the drafts by defense to suits upon them without his sanction. This position of Mr. Lersner, I am satisfied, was fully made known to Mr. Bolling by me or Mr. Lersner in his presence. Mr. Bolling expressed his regret at the dishonor of the bills, and his dissatisfaction at being an endorser upon them in such a condition, as calculated to throw discredit upon his name. I told him I thought he could not undertake to pay them in the face of a defence by the drawer, which, however, was not to be made without Mr. Bolling's sanction. He said he did not desire his feelings in the matter to interfere with Mr. Lersner's defence, and that if I thought he should make one, he would not throw any obstacle in the way, nor object to it by insisting on their being paid; though he showed sensitiveness at remaining upon the bills, protested as they were, and asked me to apprise Mr. Bacon, agent for Fraser, Trenholm & Co., of the reasons for his not meeting the drafts; which I agreed to do, and did do.

Mr. Bolling and Mr. Lersner both seemed anxious for a speedy decision of the cases. I told Mr. Bolling he could compel this by a notice under our statute to the holders. He seemed gratified at this, and asked me to have the notice served at once. I will not attempt nor do I pretend to give with verbal accuracy the foregoing conversation between the parties to this suit and myself, but of its substantial accuracy I am satisfied; and, further, while I don't remember that the defence to the drafts held by Caldwell, Shannon & Co., was mentioned, yet as all the papers relating to these drafts were before me at the time, and I contemplated and had advised defence to them, as well as to that held by Fraser, Trenholm & Co., it never occurred to me that Mr. Bolling was not fully apprised of a purpose to defend all at the time of my conference with him; and I certainly never doubted that his instructions to me were intended by him to apply to all of the drafts. No distinction was suggested by me, and none was by him, that I have the faintest recollection of, and I believe none was made. It is true the defence was different upon the drafts held by Caldwell, Shannon & Co. from that contemplated on the one held by Fraser, Trenholm & Co., but a defence was contemplated upon all. Believing then as now that I was authorzed to give notice to the holders of all the drafts in Mr. Bolling's name, to bring suits upon them, and receiving from Mr. Bolling himself a letter enclosing, I think, one from Mr. Bacon, requiring him to sue—
249 I speak of these and all the other papers referred to by me according to my memory, because they were burned in my office in Richmond—I served a notice on Mr. Bacon, agent aforesaid, in Mr. Bolling's name, to sue on the drafts held by him for Fraser, Trenholm & Co., and upon J. A. Jones, esq., attorney for Caldwell, Shannon & Co., as I learned—how I do not now recollect. Suits were brought accordingly in the circuit court of Richmond by Caldwell, Shannon & Co., and in the hustings court of Richmond by Fraser, Trenholm & Co, and this in the spring of 1864 against Learsner and Bolling. I appeared for both parties in each of the cases.

It is needless for me to go into the views which, as counsel, I held, and directed the form of defence made by me. They were such as I en-

tertained honestly as counsel, and were not dictated with any view to delay in the decision. So far from it, I prepared both cases as far as I could, and the demurrer filed in the hustings court was argued fully at the earliest day practicable—in Nov., 1864—and was held under advisement by Judge Lyons up to the evacuation of Richmond. The general issue was pleaded in the case in the circuit court, and its trial was delayed never at my instance, but I believe always for the convenience of my friend, Mr. Jones, who was engaged in public duties away from home. During the interval between the institution of the suits and the evacuation of Richmond, I never saw Mr. Bolling in that city but once, I think, and then at a distance, and never had any further communication with him until June, 1865, at his own house at Bollingbrook. In my interview with him there there was conversation in respect to the matters involved in this suit. Of these I will say nothing, except that he informed me that he had paid Caldwell, Shannon & Co. the drafts held by them. I was surprised, and perhaps expressed myself surprised, though of that I am not confident, and asked what he had paid to them. He said he could not tell the amount, though he intimated he had paid the face of them, but he never said anything then of the defence made in the suit upon them by me in his name having been unauthorized by him, and I never had any thought of his thinking I had transcended his instructions as to the use of his name until I saw his answer filed in this cause. In justice to myself, it is proper to say that I believed I had his authority to notify Mr. Jones to bring suit upon them in Mr. Bolling's name, and would never have given it or defended the suit at all, and was not authorized to do so by Mr. Lersner for him, except upon Mr. Bolling's sanction, had I not believed he gave like authority to me in respect to them, as he had given in regard to
250 the draft held by Fraser, Trenholm & Co. The last-named draft was certainly filed in the suit brought for the holders by Messrs. McFarland & Roberts, and prosecuted by Messrs. McFarland & Howard, and was in the papers when the demurrer was argued, I am satisfied, in the fall of 1864. How it was mislaid I cannot say.

I was privy to the settlement of that claim with Messrs. McFarland & Howard, and the amount paid was the amount suggested by Mr. McFarland; though I am counsel for the plaintiff in this cause, it seems proper that I should make the foregoing statement of facts in justice to the plaintiff and to myself as his counsel, as these facts are only known to myself from the nature of the transactions referred to by me.

And further this deponent saith not.

J. R. TUCKER.

And on the 26th of July, 1866, other depositions on behalf of the plaintiff were rec'd under cover, sealed, in those words:

Deposition of Ignatius L. Lersner, taken 8th June, 1866.

1st question. My name is Ignatius L. Lersner. I am of the age of 28 years, and I am acquainted with Gustavus Lersner; he is my brother.

2d question. When, if at any time, did Gustavus Lersner leave any money in your hands for his account; to what amount; and for what purpose; and with what instructions, if any?

Answer. In January, 1863, Gustavus left with me for his account about $25,000; this money was to be invested for him in such a manner as to have funds for an equivalent amount in England.

cline to pay, and stand suits thereon, especially as he had received in confederate currency but a small proportion of what he would have to return in like currency if he paid it at the time he advised with me. The laches of the parties holding the drafts was apparent, unless some adequate excuse was proved by them. According to my suggestion, Mr. Lersner and Mr. Bolling came to my office, and I stated to Bolling what I had advised Mr. Lersner, and that Mr. Lersner was unwilling
248 to do anything suspending the drafts by defense to suits upon them without his sanction. This position of Mr. Lersner, I am satisfied, was fully made known to Mr. Bolling by me or Mr. Lersner in his presence. Mr. Bolling expressed his regret at the dishonor of the bills, and his dissatisfaction at being an endorser upon them in such a condition, as calculated to throw discredit upon his name. I told him I thought he could not undertake to pay them in the face of a defence by the drawer, which, however, was not to be made without Mr. Bolling's sanction. He said he did not desire his feelings in the matter to interfere with Mr. Lersner's defence, and that if I thought he should make one, he would not throw any obstacle in the way, nor object to it by insisting on their being paid; though he showed sensitiveness at remaining upon the bills, protested as they were, and asked me to apprise Mr. Bacon, agent for Fraser, Trenholm & Co., of the reasons for his not meeting the drafts; which I agreed to do, and did do.

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tertained honestly as counsel, and were not dictated with any view to delay in the decision. So far from it, I prepared both cases as far as I could, and the demurrer filed in the hustings court was argued fully at the earliest day practicable—in Nov., 1864—and was held under advisement by Judge Lyons up to the evacuation of Richmond. The general issue was pleaded in the case in the circuit court, and its trial was delayed never at my instance, but I believe always for the convenience of my friend, Mr. Jones, who was engaged in public duties away from home. During the interval between the institution of the suits and the evacuation of Richmond, I never saw Mr. Bolling in that city but once, I think, and then at a distance, and never had any further communication with him until June, 1865, at his own house at Bollingbrook. In my interview with him there there was conversation in respect to the matters involved in this suit. Of these I will say nothing, except that he informed me that he had paid Caldwell, Shannon & Co. the drafts held by them. I was surprised, and perhaps expressed myself surprised, though of that I am not confident, and asked what he had paid to them. He said he could not tell the amount, though he intimated he had paid the face of them, but he never said anything then of the defence made in the suit upon them by me in his name having been unauthorized by him, and I never had any thought of his thinking I had transcended his instructions as to the use of his name until I saw his answer filed in this cause. In justice to myself, it is proper to say that I believed I had his authority to notify Mr. Jones to bring suit upon them in Mr. Bolling's name, and would never have given it or defended the suit at all, and was not authorized to do so by Mr. Lersner for him, except upon Mr. Bolling's sanction, had I not believed he gave like authority to me in respect to them, as he had given in regard to
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And further this deponent saith not.

J. R. TUCKER.

And on the 26th of July, 1866, other depositions on behalf of the plaintiff were rec'd under cover, sealed, in those words:

Deposition of Ignatius L. Lersner, taken 8th June, 1866.

1st question. My name is Ignatius L. Lersner. I am of the age of 28 years, and I am acquainted with Gustavus Lersner; he is my brother.

2d question. When, if at any time, did Gustavus Lersner leave any money in your hands for his account; to what amount; and for what purpose; and with what instructions, if any?

Answer. In January, 1863, Gustavus left with me for his account about $25,000; this money was to be invested for him in such a manner as to have funds for an equivalent amount in England.

3d question. Do you know of a firm of Robert Rea & Company; where did they carry on their business, and what was their business?

Answer. I know of such a firm. They carried on business in London, and carried on the provision business.

4th question. Do you know whether the firm of Robert Rea & Co. had any agency or correspondent doing their business at Liverpool?

Answer. As far as I know, they attended to their own business in Liverpool.

5th question. Do you know of a firm in Liverpool by the name of Crow, Wylie & Co.?

251 Answer. I do know such a firm.

6th question. Do you know of the firm of John Rea & Co., in the city of New York?

Answer. I knew of such a firm.

7th question. Did Gustavus Lersner ever apprize you of having drawn on Robt. Rea & Co., and for honor at Crow, Wylie & Co., in favor of Robt. B. Bolling for the respective sums of 300, 400, and 500 pounds sterling; if so, when did he so inform you? Did you cover the drafts by shipments, either at that time or at any previous time?

Answer. I was advised of such drafts having been drawn by Gustavus, about the end of March or beginning of April, 1863, as near as I can recollect. The drafts were not covered by shipments at that time, but when Gustavus was here in January of that year a shipment of goods, of provisions, was made by the firm of which I was a member, amounting to $10,000, which I told Gustavus would be for his account, but concluded afterwards not to credit him with it, of which I did not advise him.

8th question. Had you, before March, 1863, shipped more than $10,000 to Robt. Rea & Co.?

Answer. Yes, sir.

9th question. On the 18th of April, 1863, had you any, and what amount of, funds of Gustavus Lersner in your hands to be invested in shipments to England?

Answer. Inasmuch as I had not invested the amount that was agreed upon, I had *it* in my hands, and under my control, the sum of $25,000.

10th question. Did the firm of Robt. Rea & Co. fail; if so, when?

Answer. I did not know that they had failed; but I heard in July or August, 1863, that they had failed.

11th question by same. Did John Rea & Co. fail; and, if so, when?

Answer. They failed about the 25th of May, 1863.

12th question. In your conversation with Gustavus Lersner, in January, 1863, was it understood that Gustavus Lersner was at liberty to draw on Robt. Rea & Co. for any, and what amount; for your account or for the account of John Rea & Co.?

Answer. I had no account personally with Robt. Rea & Co., any further than my connection with John Rea & Co. It was agreed, when Gustavus was here in January, that the shipment which John Rea &

Co. were then making to Robt. Rea & Co., to the amount of
252 about $10,000, should be on Gustavus' account, which he could draw for at any time.

13th question. Do you remember of any person coming to New York on behalf of Gustavus Lersner, in the spring of 1863, to draw funds for him from you; if so, did you pay him anything; if not, state why you did not pay him anything.

Answer. It was in the early part of April, 1863, one Owen Holmes came to me and requested me to give him $10,000 for account of Gus-

tavus Lersner, but if I had paid $5,000 to Mr. Robt. Bolling, who was here a short time before that, requesting me to give him that amount, then I was only to give $5,000 to Mr. Holmes; but I gave no money to Mr. Holmes, as I had no money at my immediate disposal, and requested him to wait a few days in New York until I could realize on a shipment of goods I was making at that time to Robert Rea & Co.

14th question. Do you remember Mr. Robt. B. Bolling coming to you in the spring of 1863 to draw funds of Gustavus Lersner from you; if so, what did he ask for, and how much did he ask for, and what reply did you make?

Answer. Mr. Bolling came to New York a few days before Mr. Holmes, in April, 1863, requesting me to give him $5,000 in cash, for account of Gustavus; I told Mr. Bolling that I had not $5,000 at that moment, but could give him about $2,000 then, and the balance in a few days, which Mr. Bolling refused with his thanks.

15th question. Who composed the firm of John Rea & Co.?

Answer. John Rea, Emil Lersner, and myself.

IGNATIUS L. LERSNER.

Cross-examination of the foregoing witness, on behalf the deft., as follows:

1st question. By whom did Gustavus Lersner advise you, in March or April, 1863, that he had drawn on Robt. Rea & Co., and for honor on Crow, Wylie & Co., for 300, 400, and 500 pounds sterling; and you have answered to question 7th?

Answer. As near as I can recollect, the advice came by mail by way of Nassau.

2d question. When he apprised you of these drafts, in March or April, what did you reply to him?

Answer. I sent no reply.

3rd question. On whose account did you ship the produce you say you told Gustavus Lersner, in January, 1863, that you would ship on his account?

253 Answer. Although it was agreed that the shipment was to be for his account, yet, after he had left the city, we concluded—"we" means John Rea & Co.—to let the shipment go upon our own account, and the shipment was accordingly made by John Rea & Co.

Cross-examination adjourned to Saturday, June 9th, 1866, at 11½ o'clock a. m.

Cross-examination resumed June 9th, 1866.

4th question. Was there, during your connection with John Rea & Co., any produce or other goods shipped by them to Robt. Rea & Co., at any time, or any funds placed in their hands for the account of Gustavus Lersner?

Answer. No, sir.

5th question. Did you tell Owen Holmes that John Rea & Co. had made shipments to Robt. Rea & Co., or had placed funds in their hands on account of Gustavus Lersner, against which Gustavus might draw?

Answer. I can't recollect what I said to Mr. Holmes about that, if anything.

6th question. Could you have said anything like that?

(Objected to on the ground of its irrelevancy and its inadmissibility.)

Answer. Subject to the objection. I do not comprehend the question

7th question. You have stated in your answer to the 4th interrogatory

that you did not make any shipments to Robert Rea & Co. on account of Gustavus, or place any funds of Robt. Rea & Co. to the account of Gustavus Lersner, and in your answer to the 5th interrogatory you say you cannot recollect whether you told Owen Holmes whether you had shipped any goods to Robert Rea & Co., or placed any funds in their hands for the account of Gustavus Lersner; now, on your best recollection, after reflection, do you think that you could have told Holme sthat you had made such shipments or remittances to Robert Rea & Co. on the account of Gustavus Lersner?

(Objected to on the ground that it attempts to draw from the witness, not any fact, but the present impression of his mind as to what, under the given circumstances, might or might not have happened.)

Answer. I cannot tell.

8th question. State as well as you can the conversations that
254 took place between Owen Holmes and yourself when he was here in the spring of 1863, when he requested you to give him $10,000? The question is not confined to that interview, but to all the conversations that took place in New York relating to any transaction between yourself and Gustavus with reference to the demand for money which he brought from Gustavus.

(Objected to on the ground it does not call for any facts, but that it calls for conversations in the absence of the plaintiff in regard to matters beyond the ostensible employment of Mr. Holmes for Mr. Gustavus Lersner.)

Answer. With regard to this demand for $10,000, (or in the event of a payment by me to Mr. Robert Bolling of $5,000, of $5,000,) I told Mr. Holmes that I had not the funds immediately on hand, but that John Rea & Co. were at that time making a shipment of provisions to Robert Rea & Co., and that when they had realized upon their shipment in New York, I would draw from the proceeds to be charged to me $10,000, or in the event above stated, $5,000. But Mr. Holmes would not wait, and therefore left the city without any money from me. I cannot recollect the substance of conversations with Mr. Holmes, except for this particular demand for money.

Question. How many interviews did you have with Mr. Holmes?

Answer. I do not recollect.

Question. At what place did you see him?

Answer. At the store of John Rea & Co., and I think also at the Astor House.

Question. Was all the money received by you from Gustavus during the continuance of the firm of John Rea & Co. put in the firm of John Rea & Co?

(Objected to on the ground that it has no possible bearing upon this suit whether it was or whether it was not.)

Answer. It was employed in the firm of John Rea & Co.

Question. Was there any money advanced by G. Lersner to the firm, or were his advances to you, and by you to the firm?

(Objected to upon the same grounds as above stated.)

Answer. The money was advanced by Gustavus to me, (except a very small portion of $5,000, which he presented to my brother Emil Lersner,) and the money so advanced to me I lent to the firm.

Question. You say that Gustavus was here in January, 1863; when was he here again?

Answer. He was here again a few weeks ago; and about July, 1863, he was here.

255 Question. You have stated under oath in another proceeding

that Gustavus was here in February, 1863; upon reflection, after thus refreshing your memory, what do you now state as to the question of his being here in February, 1863?

(Objected to on the ground that the oath referred to in the question, if in writing, ought to be produced.)

Answer. If I had made such an oath, it is true beyond question.

Question. You have spoken of Gustavus being here in July, 1863; did you at that time pay or cause to be paid to him $20,000 in five-twenty bonds, and $5,000 in U. S. currency, which were the proceeds of monies received by you from the firm of John Rea & Co., about the dates of May 23d or May 25th, 1863?

Answer. When Gustavus was here at that time there was paid to him for me about the sum of money stated.

Question. From what source did you derive monies so paid?

(Objected to upon the ground of its being immaterial, it being a cross-examination upon a cross-examination.)

Answer. The firm of John Rea & Co., consisting at the time, namely, about the 23d or 25th of May, 1863, of John Rea and Emil Lersner, owed me a large sum of money advanced to them, of which the payment to Gustavus for me was the part payment of John Rea & Co. of their indebtedness to me.

Question. Do I understand you to say out of the amount paid you by John Rea & Co., about the 23d or 25th of May, 1863; you paid Gustavus the amounts above testified to?

Answer. Yes, sir.

Cross-examination adjourned to Monday, June 11, 1866, at 12 o'clock m.

JOHN A. GODFREY,
Commissioner.

Cross-examination of the witness, Ignatius L. Lersner, resumed this 11th day of June, 1866.

Question. Were not the amounts received by you of John Rea & Co., about the 23rd or 25th of May, 1863, and out of which $25,000 were paid to Gustavus Lersner, received by you in a check or checks of one Major? If yea, state the aggregate amounts of the checks so received through the said Major.

(Objected to on the ground of its being entirely immaterial
256 from what source the money paid to Gustavus Lersner was derived by John Rea & Co.)

Answer. The checks were drawn by Major, but I do not recollect the aggregate amounts.

Question. You have said that if you swore that Gustavus Lersner was here in the city of New York, in February, 1863, it was certainly so; refer to your affidavit in the matter of your application to be discharged from confinement, now shown you to refresh your memory, and say if your brother Gustavus Lersner was not in New York City in February, 1863, and October, 1863?

Answer. The affidavits shown me are true, to the best of my knowledge and belief, as to dates or other matter.

Question. Do we understand that these affidavits, stating that Gustavus Lersner was here in October, 1862, and February, 1863, are true?

Answer. They are true, to the best of my knowledge and belief.

Question. It appears from that affidavit, in this matter of discharge from imprisonment, that in January and February, 1863, you drew out

of the firm of John Rea & Co. about $13,000, and paid it to Gustavus Lersner, except $700. Is that a fact?

(Objected to as to form of question, referring not to fact but to former testimony in another matter.)

Answer. I can only say that the affidavits referred to are true to the best of my knowledge and belief.

Question. Will you now refer to your affidavit in the matter of your application to be discharged from imprisonment, now shown you to refresh your memory, and say if you drew out about $13,000 in cash from the firm of John Rea & Co., and, with about the exception of about $700, you paid the same to Gustavus Lersner?

(Counsel for the defendant exhibits the affidavit to the witness.)

Answer. I cannot now recollect the amounts drawn, but have no doubt it is as stated in the affidavit referred to.

Question. Then we understand you to say that the facts are as you stated in your affidavit, to wit, that you drew from John Rea & Co., about January or February, 1863, from about $13,000. and, with about the exception of $700, you paid the same to Gustavus?

(Objected to on the ground that it tries to bring in evidence matters of fact formerly testified to in another matter, and of which fact the witness states he has no present recollection.)

257 Answer. I do not testify to this as a fact, because I do not now recollect.

Question. Did you not testify to the drawing of the $13,000 from John Rae & Co., and payment of the same, less $700, to Gustavus Lersner, as asked you before on this examination, as a fact, when you applied to be discharged from imprisonment from the debtor's jail in this city?

(Objected to as irrellevant and as having been fully answered before.)

Answer. The fact referred to as having been testified to at that time, namely, on my application to be discharged from imprisonment from the debtor's jail, is not now sufficiently vivid in my recollection to testify here to as a fact.

Question. Do you not remember of drawing a large sum of money from John Rea & Co. while you were a member of the firm, and paying the same to Gustavus Lersner?

(Objected to as immaterial, outside of the merits of this controversy, and having been sufficiently answered before.)

Answer. As to paying the monies to Gustavus Lersner, while I was a member of John Rea & Co., I cannot now recollect.

Question. Is this your signature?

(Counsel for defence shows witness an original paper.)

Answer. It is my signature.

Question. Did you swear to the paper shown you before Judge Albert Cardoza, judge of New York common pleas?

(Counsel showing same paper a is referred to in previous question.)

Answer. Yes, sir.

Question. Does not this language appear in that paper thus sworn to by you: "I had drawn some money from the firm on account of my loans." "I had drawn about $13,000 in cash from the firm in January and February. The firm was dissolved on the 6th day of May, 1863." "Question. I do not understand whether or no you applied all the money withdrawn by you from the firm during its continuance towards the payment of Gustavus Lersner's claim against you." "How is that?" "Answer. I can't say that I did apply all of that money in that manner, as I used some of it towards my private expenses. I think I used

about $700 for my private expenses; the balance was given to Gustavus."

(Objected to, inasmuch as the paper speaks for itself.)

Answer. Yes, sir.

Question. Counsel here shews the witness an affidavit entitled in the supreme court, State of New York, Warren Ellis and Charles W.
258 Ellis against Emil Lersner, purporting to be signed by Ignatius L. Lersner, and sworn to by him on the 29th day of July, 1865, before John D. Billings, notary public, New York City. Counsel here shows and asks the witness if that is his signature, and if he swore to the affidavit?

Answer. I did, sir.

Question. Will the commissioner extract from said affidavit, from the words, "Ignatius L. Lersner" to the words "causeless and unmerited" inclusive, and ask the witness if the said extract makes a true representation of the facts. "Ignatius L. Lersner, being duly sworn, saith that he is the party mentioned in the affidavit of the defendant hereto annexed; that he has read the said affidavit, and knows the contents thereof; and that so far as it refers to this deponent the same is in all respects true; that when said defendant placed said money in the hands of deponent, by a check received of Mr. Major, he, defendant, fully supposed that deponent was going to pay said creditors, and that the same was placed in deponent's hands, as a mere precaution to prevent any one creditor eating up the amount in expenses, to the detriment of the rest; that deponent at the time fully intended carrying out said arrangement, but that deponent was thrown into prison without any just or reasonable cause, by one or two of the creditors, and being kept there, deponent became incensed and enraged; and that about said time deponent's brother Gustavus came to see deponent at prison, very unexpectedly, and demanded and insisted, by threats of violence, that deponent *gave* him said money; that deponent had borrowed of him $40,000, which he had lent John Rea & Co.; and that deponent at last succumbed, and let him have the money, fully expecting at the time, however, that the monies coming from England would be ample for said John Rea & Co. to settle with their creditors in full; that deponent had often since regretted having parted with said money, by reason of his brother's imprisonment, which is causeless and unmerited."

(Question objected to. 1st. The same objections as made to the questions put to him relative to the testimony given by him on his application to be discharged from imprisonment as an insolvent debtor.)

(The counsel for the defence wishes the following to be placed upon the record for the information of the court: That the witness, before the previous objection was taken, as he had done heretofore during
259 this examination, calls the attention of the counsel for the complainant that no objection has as yet been taken by him.

The counsel for the complainant denies that the witness has improperly or otherwise called his attention to any matter connected with this examination, and the counsel insists that the witness has a right to advise with or consult with counsel, or wait for examination.

The commissioner states, as far as the last question is concerned, the witness stated he would wait for the complainant's counsel, so that he might make any objection, if he wished to. The counsel for the complainant was in an adjoining room, and upon his attention being called, made the objection here noted to the last question to the witness.)

Answer. To the best of my recollection the representations referred to in the extract are true representations.

Question. What was your interest in the firm of John Rea & Co.?

Answer. Five-ninths of the profits.

Question. Did you execute to Gustavus Lersner any obligation or any acknowledgment for any money received by you of him as aforesaid, and what was he to be paid for the use of the said money?

Answer. I gave no obligation for the money received.

(The witness declines further answering the question. The counsel for defence insists upon the witness answering the question. The witness refuses to answer the question further.)

Question. What was he, Gustavus Lersner, to be paid for the use of "the said money;" I mean the money received from him by you, and employed by the firm of John Rea & Co?

(Objected to on the ground that it is wholly immaterial and irrelevant to the matters in controversy, and an enquiry into private matters of which the parties had no concern.)

(The witness refuses to answer the question.)

Question. Have you not already sworn that Gustavus Lersner was to have one-half of the profits of the business in which you might engage with John Rea & Co., or any other business, with 7 per cent. interest on the amount received, and did you not so swear upon your application to be discharged from imprisonment?

(Objected to on the ground that it is an inquiry as to evidence heretofore given in another matter, and the proof of it can be made by the affidavit referred to, and also it is an immaterial question.)

260 Answer. I don't recollect.

Cross-examination adjourned to June 12th, 1866.

Cross-examination resumed this the 12th day of June, 1866.

Question. Did you not swear on your application to be discharged from imprisonment as follows: "There was an agreement made at that time and place," referring to January, 1863, at the Lafarge House, "between Gustavus Lersner and myself which is not now in existence?"

Question. What compensation was Gustavus to receive by this agreement?

Answer. He was to have the money returned by me at 7 per interest, and I was to share with him if there were any profits in the business. I was to give Gustavus one-half of the profits that I received or was to receive for any business—from any business in which I might engage. There was no restriction in the agreement as to the use I was to make of the $25,000, except a recommendation that was written in the papers, that the money should be used in the provision business with John Rea & Co., or John Rea & Co. having the preference?

(Objected to on the ground of its immateriality and its irrelevancy, and as not being the whole of the witness's swearing in his application to be discharged.)

Answer. I did.

Question. Was that statement true, and was it the whole truth?

(Objected to on the ground that this examination does not involve the trial or examination of the truth of statements made upon his application; and if such be the question now on trial, whether he swore truly or falsely in another matter, then the witness has a right to refuse to answer the question, on the ground that it might involve him, and also on the ground of irrelevancy.)

Answer. Although the answer will neither criminate or disgrace me, I refuse to answer the question.

Question. Have you not heretofore said that what was contained in

your affidavit, or your examination, on your application to be discharged from imprisonment, was true?

(Objected to as irrelevant and immaterial.)

Answer. I do not know whether I said it or not.

Question. In your affidavit, sworn to 29th of July, 1865, before
261 John D. Billings, hereinbefore mentioned, you say you have read the annexed affidavit, (referring to the affidavit of Emil Lersner, purporting to be sworn to on the 28th of July, 1865, before Orville O. Jones, commissioner of deeds,) and know the contents thereof, and, so far as the same refers to you, the same is in all respects true? From that part of Emil's affidavit in which he speaks of your transferring, in July, 1863, to Gustavus Lersner funds which Emil had placed in your hands I extract the following passage: "That deponent, i. e., Emil, in no way or manner consented to, knew of, or sanctioned such transfer." Is that extract true?

(Objected to as irrelevant and immaterial.)

Answer. I cannot now answer for the truth of another person's affidavit, or to the truth of its contents.

Question. Was such transfer made with Emil Lersner's sanction, knowledge, or consent?

(Objected to for the reasons above stated.)

Answer. Inasmuch as my dealings with Gustavus were no business of Emil's, I did not ask his consent to transfer; nor do I know, nor did I care, whether he know of or sanctioned the same.

Question. Did you not start from New York in June, 1863, or thereabouts, in company with Owen Holmes, to see Gustavus Lersner, and get to Lovettsville, Loudo'n County, Virginia, before you were arrested and brought back? Was Holmes arrested and brought back with you?

Answer. At the time mentioned I received a pass from the provost-marshall at Baltimore to visit Lovettsville, Virginia, and I went on the strength of that pass, but was arrested upon reaching the place by order of one McPhail, also a provost-marshall at Baltimore, who had no charge against me, telling me that there were at Baltimore at that time persons calling themselves creditors of mine, and that if I did the right thing (which I understood to be bribery) I could go on my way. I came to New York in charge of a deputy marshall, and being here arrested on a civil suit, I heard nothing more of my arrest by McPhail. Holmes went out with me from New York and was also brought back from Lovettsville to Baltimore, but not under arrest, and I did not see him again in Baltimore.

Question. In your application to be discharged from imprisonment, before referred to, I read as follows: "I left the city on the 1st of June. I went from here to Baltimore in company with
262 a man from Virginia. This man told me that Gustavus lived in Loudoun County, Virginia; that man's name is Holmes, and lives in Loudoun County, Virginia. He came to see me about a week or ten days before the 1st of June. I think it was after I had the money. He was a stranger to me, and had a line of introduction from Gustavus. Holmes told me that if I wanted to see Gustavus, he would take me to Loudoun County, where he said lived. Holmes stopped at the Astor House until we left New York. He gave me no reasons why he wanted to go to Loudoun County. I saw him very frequently every day. I don't think Holmes had any business here. I shouldn't wonder if he came on purpose to bring the letter. I never wrote any letter to Gustavus between Jan.

uary 1st and June 1st. I think I sent a message; it was sent by Bolling. I don't know what part of Virginia he was from. I don't know where Gustavus was at that time; have no belief where he was; the message was that everything was going on well." Did you so swear to that statement before Albert Cardozo, judge New York common pleas?

(Objected to as irrelevant, immaterial, and improper.)

Answer. I did.

Question. I also read from the same examination as follows: "Gustavus gave no advice generally how to conduct our business. He came to New York to see us particularly; he so professed, he so told us. He said he wanted to see how we were getting on in business. I refer to the visits of Gustavus between the 1st January, 1863, and the sixth of May, 1863. He made no examination into the condition of our affairs. He confined himself to asking all three of us about the affairs. Gustavus knew I was worth nothing when I went into the firm 1st of January, 1863. I do not know whether Gustavus had any other business in New York; there was no reason for him coming so often, as I could see. I alone was responsible for the money; he knew that he could only get his money from out of the business. He had a right to sue me at once on loaning me the money, but he promised me he would not do that." Did you so swear to that statement before Judge Cardozo?

(Objected to as irrelevant, immaterial, and improper.)

Answer. Yes, sir.

Question. Are these extracts that I have just read, and which you swore to, true?

(Objected to as immaterial, irrelevant, and improper.)

Answer. Although I could not disgrace or criminate myself by any answer to this question, I refuse to answer the question.

263 Question. Were you not arrested and held to bail by various parties in New York on your return from Lottesville, Virginia, as stated, by reason of your connection with the firm of John Rea & Co., the receipt of monies from John Rea & Co., and the payment of the said monies to Gustavus Lersner, as stated in this question?

(Objected to as immaterial.)

Answer. In order to answer this question I would have to see all the affidavits of the parties having me arrested to find out their alleged grounds.

Question. For what were you arrested and held to bail?

(Objected to as immaterial.)

Answer. For alleged debts; but I declare that I did not consider myself indebted at that time to the amount of a single dollar to any of the alleged creditors, and that I was only forced to acknowledge a debt by reason of my confinement.

Question. They obtained judgments against you in those suits in which you were arrested, did they not?

(Objected to on the ground that the judgment-records are the best evidence, and as immaterial.)

Answer. I do not recollect whether they obtained judgments in the regular course of practice or whether I compelled them to take judgments.

Question. Were judgments entered against you in the suits?

Answer. Yes.

Question. Are there not large unsatisfied debts against John Rea & Co., contracted by them after your retirement from the firm?

(Objected to as immaterial.)

Answer. I believe there are.

Question. Did not their solvency at the time you retired from the firm depend upon Robert Rea & Co. accounting to and paying them the balances supposed to be due them on shipments made to Robert Rea & Co.?

(Objected to as immaterial.)

Answer. I refuse to answer the question.

Question. Were John Rea & Co. solvent or insolvent at the time you retired from the firm?

(Objected to as immaterial.)

Answer. I refuse to answer.

Question. Had Robert Rea & Co., at the time you retired from the firm, rendered any account to John Rea & Co. of the shipments received by them from John Rea & Co.?

(Objected to as immaterial.)

Answer. Not to my recollection.

264 Question. At the time you retired from the firm of John Rea & Co. had they $25,000 in assets over and above their liabilities, not taken into account anything which might be due to them from Robt. Rea & Co.?

(Objected to as immaterial.)

Answer. I don't know.

Question. Was not the money paid to you by the checks of Major, as aforesaid, the proceeds of bills of lading or shipments made by John Rea & Co. to England, which shipments were purchased by John Rea & Co. after your retirement from the firm?

(Objected to as immaterial.)

Answer. I refuse to answer the question.

Question. Will the answer to that question criminate you?

Answer. I believe not.

Redirect examination resumed:

Question. Were or were not Crow, Wylie & Co. advised, and, if so, by whom and when, that Gustavus Lersner had drawn for £300, £400, and £500 for honor at their house? Please to state all you know on this subject.

(Objected to by counsel for defense on the ground that the point was not touched upon the cross-examination, and it is entirely new matter; that it is immaterial and irrelevant, and that the question is improper.

Answer. When I received advice from Gustavus that he had drawn drafts for 300, 400, and 500 pounds sterling on Robert Rea & Co., or for honor on Crow, Wylie & Co., he gave me a copy of the drafts as they were drawn, when I discovered that he had made an error in the name Robert Rea & Co., the name Rea being spelled "Rae" instead of Rea, and also that they were directed to w'ere John Rea & Co. were in the habit of shipping their goods, namely, at Liverpool, instead of at the office of Robert Rea & Co. in London. I therefore wrote immediately to Crow, Wylie & Co., Liverpool, advising them of the drawing of such drafts and also of the error, and requested them to accept the drafts on presentation, and that I should at once make preparations to provide funds for their payment; that is, the payment of the drafts.

Recross resumed:

Question. Did you provide funds for their payment?

265 Answer. No.

Question. Where is the place of business of Crow, Wylie & Co., in Liverpool?

By same. What was his character as a business man, as to solvency and honesty?

(Excepted to by plaintiff's counsel as irrelevant.)

Answer. Mr. Lersner was looked upon by the people as pretty hard up, as I was at that time. I never heard much as to his dishonesty, but that he did not pay. His hands refused to work because they did not receive their pay. I do not know whether it was because he had not the money or otherwise. Some said he would cheat me of my lumber, but when his hands quit him I rented the saw-mill, and I sawed until I caught up with Lersner, according to his statement, and
268 Mr. Lersner retook the mill and we settled so that I was satisfied.

And further this deponent saith not.

LARKIN LAKE.

Deposition of Robert Marshall, taken same time as the above.

Question by defendant. Are you acquainted with the general character of Gustavus Lersner, the plaintiff, as a business man in this community, as to solvency and integrity?

(Excepted to by plaintiff's counsel as irrelevant.)

Answer. I cannot say that I am; but from what I heard of him, the impression made upon my mind was that he was insolvent and not prompt in paying his hands. I cannot speak as to his general reputation for integrity. I don't know.

By same. What was the character of his business—that of regular trade or of adventure and speculation?

Answer. I do not know.

And further this deponent saith not.

ROBERT M. MARSHALL.

And on the 27th of August, 1866, the defendant filed a paper in these ords:

As one of the counsel for Fraser, Trenholm & Co., in their action in the cou of hustings for the city of Richmond against Gustavus Lersner and Robert B. Bolling, I had occasion to compare the original bill of exchange upon which said action was founded with the declaration filed in the same. I made such comparison accordingly and found that the bill and endorsement corresponded accurately and in every particular with the description of them given in the declaration. The endorsement by the defendant Bolling was in blank. Besides that endorsement, and subsequent to it, there were on the bill, according to the best of my recollection, two other endorsements—one by the plaintiffs to their correspondent' in England, and another by those correspondents to some other party in England, both these endorsements being special, and both apparently made for the mere purpose of collection; but the endorsement subsequent to that of Bolling not being noticed in the declaration, my recollection about them is not very distinct, and I am not certain that either of them was by the plaintiffs. I feel quite sure, however, that there were upon the bill two endorsements after that of Bolling, and that these were specified in the copy of the bill annexed to
269 the protest.

N. P. HOWARD.

RICHMOND, *June* 6, 1866.

We hereby agree that the within statement of N. P. Howard may be

read in the case of Lersner vs. Bolling in the circuit court of Fauquier, subject to all just exceptions.

JAMES ALFRED JONES,
Counsel for Bolling.

August 18th, 1866.

TUCKER & NOLAND,
For Lersner.

And on the 29th of August, 1866, other depositions on behalf of the defendant were rec'd under cover, sealed, in these words:

The defendant produces, as a witness, PHINEAS C. WRIGHT.

(Before this witness is sworn, plaintiff's counsel objects to this witness being examined, for the reason that his christain name does not appear either in the commission or in the notice to take testimony.)

Deposition of Phineas C. Wright, (taken in New York 24th,) August, 1866.

1st question. What is your name, residence, and occupation, and place of business?

My name is Phineas C. Wright. My present residence is on Staten Island, this State. I am president of the American Emigrant Aid and Homestead Company. My place of business is at No. 62 Broadway, in the city of New York.

2d question. As such president, are you or not the agent for the sale of the tract of land called Elmwood, near Upperville, in the county of Fauquier, in the State of Virginia; and, if so, describe said property; by whom it was placed in your hands for sale; who is the owner; when it was placed in your hands; and what is the price for the same.

(Plaintiff's counsel objects to this question.)

Answer. There is upon the books of said company a tract of land designated as Elmwood for sale. The tract of land is described as follows: Lying within a mile of Upperville, Fauquier, Virginia, containing five hundred acres of land, which cannot be surpassed in the State for
270 farming and grazing; it is stone-fenced, with an elegant brick house and outhouse; every field is well watered, and contains a surplus of timber, for which there is plenty sale at Upperville. Price, $30,000, or $20,000 in gold. It was placed in our hands for sale by R. C. Bently, of Upperville, Virginia. The owner was represented to us to be Gustavus Lersner. It was placed in our hands about March last, 1866, as president of said company, but it came into the hands of Wright, Carter & Co., of which firm I was a member, in December, 1865, and said company succeeded to their business.

P. C. WRIGHT.

Deposition of John Rea, taken 24th August, 1866.

1st question. What is your name, age, residence, and occupation?

Answer. My name is John Rea; I am 28 years old; I reside in Brooklyn, eastern dis'rict; I am a member of the Meltropolitan police department.

2d question. Who composed the late firm of John Rea & Co., of New York?

(Objected to.)

Answer. Myself, John Rea, Gustavus Lersner, Emil Lersner, and Ignatius Lersner.

3d question. When was the copartnership formed?
(Objected to by plaintiff's counsel.)
Answer. About the first of January, 1863.
4th question. What proportion of the profits were each to have?
(Objected to.)
Answer. Gustavus Lersner was to have 7 per cent. interest on the capital he was to put in and one-half of the profits, and the other half of the profits was to be divided equally between myself, Emil, and Ignatius Lersner.
5th question. What was the style of the firm?
(Objected to.)
Answer. John Rea & Co.
6th question. State whether or not the name of Gustavus Lersner appeared in the name or style of the firm.
(Objected to.)
Answer. It did not.
7th question. State whether or not you had any conversations with said Gustavus in reference thereto; and, if yea, state the same, and when.
271 (Objected to.)
Answer. I did have conversations with him on that subject at the time when the copartnership was formed and befo e the articles of copartnership was signed; he stated to me that it would not do for his name to appear in the firm, as he was assistant quartermaster in the confederate service, and that if his name appeared what he put into the concern *it* would be liable to confiscation.
8th question. What was the business of the firm of John Rea & Co.?
Answer. The curing of provisions for the European market, and buying of provisions for shipment to the said market.
9th question. What branch of the business did you particularly attend to?
(Objected to by plaintiff.)
Answer. I took charge of the work, overseeing the cutting and curing of hogs and the examination of provisions bought for shipment, and I had the endorsing of the bills of lading and bills of exchange.
10th question. Who were the consignees of the firm in Europe?
(Objected to by plaintiff.)
Answer. Robert Rea & Co., of London.
11th question. Did your firm ever make any shipments to any other person or persons than Robt. Rea & Co., of London?
(Objected to by petitioner.)
Answer. No, sir.
12th question. How is the name of Robt. Rea & Co. spelled?
Answer. Robert Rea & Co.
13th question. State whether or not Robt. Rea, of Rea & Co., was in New York during the year 1863; and, if yea, at about what time.
(Objected to by plaintiff.)
Answer. He was; he arrived here in the Europa about the 14th of April, 1863.
14th question. State who accompanied him to this country.
(Objected to.)
Answer. Emil Lersner.
15th question. When, if you remember, did Emil leave for Europe before that time?
(Objected to.)

272 Answer. In March, 1863.

16th question. State whether or not Emil's tr ip to Europe was upon the affairs of the firm of John Rea & Co.?

(Objected to.)

Answer. I was given to suppose so by Emil and Ignatius Lersner.

(Answer objected to.)

17th question. How long did Robt. Rea stay in this country?

Answer. About 20 days.

18th question. While he, Robert Rea, was in this country, did you or not see a letter written by Gustavus Lersner stating that he had drawn bills of exchange on Robert Rae & Co., of Liverpool, for three, four, and five hundred pounds; and, if yea, who was present, and what was said by each one?

(Objected to.)

Answer. I did see a letter written by Gustavus Lersner about the 29th day of April, 1863. It informed us, John Rea & Co., that he had drawn three drafts on Robert Rae & Co., of Liverpool, for three hundred, four hundred, and five hundred pounds. Emil Lersner, Ignatius Lersner, and myself were present at the reading of the letter. The letter had been received while I was in Canada, and, on my return, Emil handed me said letter and asked me what I thought of that. I told him I did not know what to make of it. He answered and said, "I think he has made a fool of himself to draw on a house of which he does not know the name or location," and they were surprised at his doing so. I asked them if they had given Gustavus any authority to draw on Robert Rea & Co. of London and they said certainly not; that they had not given him any permission to draw on Robert Rea Co., and that they had not even informed Robert Rea & Co. that he was a member of John Rea & Co.

19th question. Where was Robt. Rea at this time?

(Objected to.)

Answer. He was here in the city of New York at that time.

20th question. Do you remember the day Robert Rea left New York for Europe?

Answer. Yes; it was the 6th of May, 1863.

21st question. When, if at all, did Ignatius Lersner retire from your said firm?

(Objected to.)

Answer. On the 6th of May, 1863.

273 22d question. State whether or not, if after he retired from the firm, the firm of John Rea & Co. purchas'd large quantities of goods in the city of New York; and, if so, about what amount, and shipped the same to Europe, consigned to Robt. Rea & Co.

(Objected to.)

Answer. We did. About $40,000 worth in bacon, and shipped the same to Robert Rea & Co., of Liverpool.

23d question. Did or not John Rea & Co. fail in business? If yea, at about what time?

(Objected to.)

Answer. We did; about the 23d of May, 1863.

24th question. When was the said $40,000 worth of bacon purchased?

(Objected to.)

Answer. It was just prior to the failure.

25th question. What was done with the bills of lading of the shipment of said bacon?

(Objected to.)

Answer. They were sold to Mr. M. Major, of Exchange Place, in this city, about the 21st day of May, 1863. I delivered them to said Major myself.

26th question. Who received the money upon the sale of these bills of lading, and on what day?

(Objected to.)

Answer. Emil Lersner; about the 23d and 25th day of May, 1863, as I was informed by said Emil and said Major.

27th question. How were said bills of lading disposed of? Explain the manner in which you disposed of your bills of lading of merchandise consigned to Robert Rea & Co.

(Objected to.)

Answer. We drew bills of exchange on Robert Rea & Co., of London, and attached them to the bills of lading, and disposed of them to M. Major.

28th question. About how much money was so received from said Major by Emil?

(Objected to.)

Answer. About thirty thousand dollars.

29th question. Were the parties from whom you purchased, or your firm purchased, said bacon ever paid?

(Objected to.)

Answer. But few of them were paid. About ten thousand dollars was collected from the property of the firm.

30th question. What did Emil do with the said money re-
274 ceived by him from Major?

(Objected to.)

Answer. He paid it over to Ignatius Lersner about the 25th day of May, 1863.

31st question. What did Ignatius Lersner do immediately thereafter?

(Objected to.)

Answer. He started for the South—Virginia.

32d question. What did Emil Lersner do immediately thereafter?

(Objected to.)

Answer. He absconded from the State of New York, and remained concealed for about twelve months.

33d question. Upon what, if any, representations was said $40,000 worth of property bought?

(Objected to.)

Answer. If any questions were asked it was stated in answer that the condition of the firm was sound. I do not remember that any such question was asked of me, but do remember that in Smith & Armel's office, of whom we purchased some of said bacon, in my presence, that Emil Lersner said to them that said firm of John Rea & Co. was worth fifty thousand dollars.

34th question. When next after this did you see Ignatius Lersner? State what was said and done.

(Objected to.)

Answer. In Ludlow street jail, about the early part of June, 1863, and he then had the money he had received from Emil Lersner, and he told me that if I would keep still he would make a settlement with the creditors and make a much better arrangement with them than I could. Ignatius told me he had the said money. I was confined in said jail at that time at the suits of some of the creditors. One day I saw Gustavus Lersner leaving the jail in July, 1863. I asked Ignatius what Gustavus was doing there; Gustavus was not present at the interview; Ignatius

replied that he came there to get the proceeds of the failure—I mean the proceeds of the shipments of said bacon. I asked Ignatius what he was going to do about it; he replied that he was going to give the said money to Gustavus, and that he would have given it to him then if he had had the money with him, but as it was at his brother Morris' house, *and* he had to send up there for it; I asked him if he had not promised me that he was going to use that money towards the payment of the creditors of John Rea & Co.; he replied that he had so prom-
275 ised, but that it had been a settled thing between him and his brother previous to the time of his getting the note of the 6th of May, 1863, that he was to get hold of that money on the first opportunity, and that if the creditors had been fifteen minutes later with the provost-marshall in arresting him at the Point of Rocks the money would have been paid in Gustavus' hand a month previous, for that at the time he was arrested he was in sight of Gustavus, and he said that I was very foolish to suppose that he was going to pay anything over to the creditors.

35th question. Did you or not receive any note or letter from Gustavus about this time?

(Question withdrawn.)

36th question. What endeavors, if any, did you make to have Gustavus Lersner arrested?

(Objected to.)

Answer. I informed General Wool and Provost-Marshall Nugent, and some of the creditors of John Rea & Co., and endeavors were made to arrest him by several provost-marshalls, but he got off on a steamer to Nassau.

37th question. State whether or not Gustavus Lersner ever retired from the firm of John Rea & Co.?

(Objected to.)

Answer. He did not.

38th question. At the time Ignatius retired from the firm did or did not the solvency of the firm of John Rea & Co. depend upon the presumption that Robt. Rea & Co. owed them a large amount of undrawn margins on shipsments made to them by your firm, or, in other words, on the state of your account with Robt. Rea & Co.?

(Objected to.)

Answer. It did.

39th question. Have you ascertained what the state of your account with Robert Rea & Co. was? If yea, state.

(Objected to.)

Answer. We owe Robert Rea & Co. eight hundred and ninety-four pounds.

40th question. State whether or not Gustavus Lersner, during the existence of the firm of John Rea & Co., was frequently in New York and held communication with the firm by different persons.

(Objected to.)

Answer. He was frequently in New York during that time, and he frequently sent messages to our place of business; he sent on
276 bonds here to be sold for his account, and sent parties on here for money several times, and I believe they got it. I had nothing to do with the books or financial business of the firm. I don't know of my own personal knowledge that any bonds were received from him. I speak from hearsay.

41st question. When Robert Rea was here, was or was not any arrangement made, and if so, what, with reference to the manner in which the bills of John Rea & Co., on Robt. Rea & Co., should be drawn?

(Objected to.)

Answer. There was an arrangement made with Robt. Rea when he was here in reference to the manner in which bills should be drawn on Robert Rea & Co., and which was that there should be left a margin upon the cost of the goods here of 25 per cent., and it was arranged that the bills of lading and bills of exchange were to be endorsed by me in the name of our firm. Previous to that time the bills had been drawn fully up to the price the goods cost in this market. The endorsements were to be made in my handwriting as a guaranty of their correctness, and to assure said Robert Rea & Co. that they were drawn in accordance with said arrangement.

42d question. Do you know whether Gustavus Lersner and Morris Lersner were at any time engaged in business together as partners? If so, state where they carried on business and what you know about them.

(Objected to.)

Answer. They were in Philadelphia. I believe from what they told me they failed in 1857. They told me the amount of their liabilities was $60,000.

Cross-examination:

1st question. Was Robert B. Bolling, the defendant, at any time a creditor of John Rea & Co.?

(Objected to on the ground it requires the witness to state a conclusion in law, and is irrelevant and immaterial.)

Answer. No.

2d question. At the time that Ignatius Lersner withdrew from the firm of John Rea & Co., was or was not notice of that fact and of the remaining partners, Emil Lersner and yourself, continuing the business of John Rea & Co., published in one or more newspapers?

277 (Objected to as irrelevant and immaterial, and further that the publication referred to should be produced or evidence of its loss be furnished.)

Answer. It was.

3d question. At the time of the withdrawal of Ignatius Lersner was there any written article of copartnership executed between you and Emil Lersner?

Answer. There was not.

4th question. At that time, namely, the time when Ignatius Lersner so withdrew, was Gustavus Lersner in New York?

Answer. Not to my knowledge.

5th question. When the firm of John Rea & Co. was formed, were there articles of copartnership executed between the parties?

Answer. There was; all the parties signed them. I have not got a copy of them. I did have a copy of them. It was in the safe at the store of John Rea & Co. The last time I saw it was in the month of April, 1863, and that is the last I have ever seen it.

6th question. Can you state the aggregate amount of the shipments and their value made by John Rea & Co. to Robert Rea & Co., and to which the latter accepted?

Answer. I cannot.

7th question. Can you say whether these shipments amounted in the whole to twenty thousand pounds sterling, or how near thereto?

Answer. I cannot state, as I had nothing to do with the books.

8th question. Did you, in drawing upon Robt. Rea & Co., and endorsing the bills in your own writing, leave a margin of 25 per cent. in value, as agreed upon?

Answer. On the bills of lading that I endorsed there was 25 per cent. margin left, according to the accounts that I received in the office of the weights of the provisions; but I have since found out the account sales handed to me was made out falsely.

9th question. Were you confined in jail on the ground of defrauding your creditors; and, if so, how long were you confined?

(Objected to as immaterial and irrelevant.)

Answer. I was for the space of three months.

Redirect:

278 1st question. Were you or were you not honorably discharged from imprisonment by the creditors who had you in prison, and did they or not state to you that they considered you innocent of any intent to defraud them, and offered to take you into their employment?

(Objected to as irrelevant, improper, and as not stating the whole of the bargain upon which the witness was to obtain the arrest of Gustavus Lersner.)

Answer. I was honorably discharged from imprisonment. The creditors who had me arrested told me that they considered me innocent of any intent to defraud them. One of the creditors, Mr. Armel, offered to put me in charge of his pork-packing establishment in Cincinnati. I never made any bargain or any kind of arrangement with any of the creditors as an inducement for my discharge or for the arrest of Gustavus Lersner.

2d question. With reference to the publication of notice of the retirement of Ignatius Lersner from said firm of John Rea & Co., and the continuance of the business by yourself and Emil Lersner; when first was it brought to your knowledge?

(Objected to.)

Answer. Two or three days after the retirement of Ignatius from the firm I was down town on 'Change and saw Mr. Reid, of the firm of Reid & Rounday, and he asked me if it was so that Ignatius had withdrawn from the firm, and he said he had seen notice of his withdrawal in the New York Herald. I went and saw the Herald and saw such notice in it, and for the day before; it was spelled wrong—I mean the name of the firm. I did not sign my name to any such notice, and I did not know of such notice being made or drawn until Mr. Reid informed me. By the terms of our copartnership-agreement it was to continue three years and four months. It required the consent of all for any one to leave the firm, and Gustavus did not have such consent.

JOHN REA.

The further taking of these depositions is adjourned until Monday next, August 27th, at 10 o'clock a. m., to be continued at same place.

SYLVESTER LAY,
Virginia Commissioner.

Deposition of John M. Bolling, taken 27th August, 1866.

1st question. What is your name, age, residence, and occupation?

279 Answer. My name is John M. Bolling; I am 32 years old; residence, New York City; I am an attorney and counsellor at law.

2d question. Do you know the parties to this suit; and, if so, how long have you known them?

Answer. I do know the parties to this suit. I am the son of the defendant, Robert B. Bolling. I have known the plaintiff, Gustavus Lersner, several years.

3d question. Where were you during the months from January to April, 1863, include May?

Answer. In the city of Petersburg, Virginia.

4th question. Did you see Gustavus Lersner during those months?

Answer. I did several times.

5th question. State whether or not you received anything from Gustavus Lersner for your father, on account of the purchase of the Bollingbrook and Ben Lomond estates; if yea, at what dates, in what currency, and in what was it invested?

(Objected to.)

Answer. I did receive something from him on account of the purchase of those estates for my father. Some time in January, 1863, I was instructed by my father, as his agent, to receive from Gustavus Lersner, on account of the purchase of the estates mentioned above, seventy-seven thousand dollars, which was to be paid in three instalments: $17,000 on the first day of February, 1863; $30,000 on the first of March, 1863, and $30,000 on the 10th of March, 1863. On the 4th of February I received, on account of Gustavus Lersner, a check of T. T. Brooks for two thousand and thirty ($2,030) dollars, on a city bank in Petersburg. I do not now recollect the name of the bank. On the 7th of February, 1863, Gustavus Lersner gave me or sent me a draft for $11,430 on Lancaster & Co., of Richmond. On the 11th of February, 1863, I drew by his directions, on his account, on Wm. M. Brown, of Richmond, for $3,540. On the 25th of February, he gave me another draft on Lancaster & Co., of Richmond, for $10,000. Then afterwards, in March—the exact day I do not recollect—he gave me a draft on Lancaster & Co., of Richmond, for $20,000; and all these drafts and checks were paid in Confederate States treasury-notes, and I invested the same in Confederate States bonds for my father.

6th question. What, if anything, passed between you and Gustavus Lersner as to the payment of the last instalment on the said purchase—I mean the instalment of $30,000 to be paid by him on the 10th of March, 1863?

280 (Objected to.)

Answer. After the last instalment, that is the one of $30,000, was due, I had a conversation with Gustavus Lersner; it was during the month of March, 1863, and he said he was not ready to pay that $30,000, and requested me to extend the time of payment for some weeks. This I declined to do, as I had already been indulgent beyond my authority as to the payments which had been made; and I wrote to my father, who was then in Fauquier County, Virginia, informing him of Lersner's delinquency.

7th question. How long after that before you saw your father?

Answer. About the second week in April my father came to Petersburg, in response, he said, to my letter, to settle with Lersner.

8th question. At that time, while he was in Petersburg, state whether or not he showed you a letter addressed to him by Gustavus Lersner; and, if so, state the contents thereof, and what your father said, and what was his conduct in reference thereto.

(Objected to.)

Answer. At that time my father showed me a letter recently received from Gustavus Lersner, dated in April, 1863, which I read. In this letter Gustavus Lersner proposed to my father to endorse Lersner's note in bank for $30,000, that he, Lersner, might have it discounted, and with the proceeds be able to pay the last instalment spoken of. In showing me this letter my father remarked that it was the most im-

pudent proposition he ever heard of; that he would not entertain it for a moment; that he would go over to Richmond, and if Lersner did not pay the money, he would have nothing more to do with him, and would annul the contract. That letter I had in my possession, but it has been lost. My father's papers, among which was, I believe, this letter, were left in Petersburg, at his residence, and, I believe, fell into Federal possession, when they occupied Petersburg. This letter was received prior to April 18th, 1863. I attach hereto an affidavit made by my father, marked "Exhibit A."

Cross-examined:

1st question. At the interview between your father and yourself that you have testified to, was Gustavus Lersner present?

281 Answer. He was not.

JOHN M. BOLLING.

Exhibit A.—August 27th, 1866.—SYLVESTER LAY, *Com'r.*

LOUDOUN COUNTY,
State of Virginia, to wit:

This day personally appeared before me, a justice of the peace in and for the county of Loudoun, State of Virginia, Robert B. Bolling, and made oath that he has lost a letter received by him from Gustavus Lersner a short time before the 18th day of April, 1863, the contents of which letter he, the said Bolling, wishes to prove. Witness the following signature this 20th day of August, 1866.

HEROD T. FRASIER, *J. P.*

And on the 5th day of September, 1866, the defendant filed sundry papers in this cause, in these words:

(One of these papers is the Baltimore Gazette of the 30th of April, 1866, and contains the proclamation of Andrew Johnson, President of the United States, dated "the second day of April," 1866; but, as I find nothing in said paper marked for copy into the record, I pass it with this reference.

JNO. S. BRYNE, *Clk.*)

Another of said papers is headed thus: "Headquarters Department of Virginia, Richmond, Va., Jan. 24th, 1865.—General Orders No. 4." And is signed thus: "By command of Major-General Terry, Ed. W. Smith, assistant adjutant-general."

Another of said papers is in these words:

EXECUTIVE MANSION,
Washington, D. C., Oct. 2, 1865.

DEAR SIR: It may become necessary that the Government prosecute some high crimes and misdemeanors committed against the United States within the district of Virginia. Permit me to inquire whether the circuit court of the United States for that district is so far organized and in condition to exercise its functions that yourself and others

282 of the associate justices of the Supreme Court will hold a term of the circuit court there during the autumn or early winter for the trial of cases.

Very respectfully,

ANDREW JOHNSON.

To the Hon. S. P. CHASE, *Chief-Justice Supreme Court*.

Reply of Chief-Justice Chase.

WASHINGTON, *Thursday evening, October* 12, 1865.

DEAR SIR: Your letter of the 2d, directed to Cleveland, and forwarded to Sandusky, reached me there night before last. I left for Washington night before last, and am just arrived. To your inquiry whether a term of the circuit court of the United States for the district of Virginia will be held by myself or one of the associate judge' of the Supreme Court during the autumn or early winter, I respectfully reply in the negative. Under ordinary circumstances the regular term authorized by Congress would have been held on the 4th Monday in November, which this year will be the 27th. Only a week will intervene between that day and the commencement of the annual term of the Supreme Court, when all the judges are to be in attendance at Washington. That time is too short for the transaction of any very important business. Were this otherwise, I so much doubt the propriety of holding circuit courts of the United States in States which have been declared by the executive and legislative departments of the national Government to be in rebellion, and therefore subject to martial law, before the complete restoration of broken relations with the nation, and the supersedure of the military by the civil administration, that I am unwilling to hold such courts in such States within any circuit which includes Virginia until Congress shall have had an opportunity to consider and act on the whole subject. A civil court in a district under martial law can only act by the sanction and under the supervision of the military power; and I cannot think it becomes the justices of the Supreme Court to exercise jurisdiction under such conditions. In this view, it is proper to state that Mr. Justice Wayne, whose whole circuit is in the rebel States, concurs with me. I have had no opportunity of consulting the other justices; but the Supreme Court has hitherto declined to consider cases brought before it by appeal or writ of
283 error from circuit or district courts in the rebel portions of the country. No very reliable inference, it is true, can be drawn from this action, for circumstances have greatly changed since the court adjourned; but, so far as it goes, it favors the conclusion o' myself and Mr. Justice Wayne.

With great respect, yours, very truly,

S. P. CHASE.

(Another of said papers is The Sentinel, of 27th February, 1866, and contains a speech delivered by Secretary Seward, "at the great Johnson meeting in New York City, on the 22d instant;" but, as the same has not been marked for copy in this record, I pass it with this reference.)

And on the 13th day of September, 1866, the plaintiff filed papers in this cause, in these words:

VIRGINIA:

Pleas before the circuit court of the city of Richmond, at the State capitol, in said city, on Friday the 16th day of March, 1866.

Be it remembered that heretofore, to wit, on the 29th day of June, 1864, came Milton Caldwell and Edward B. Shannon, merchants and

partners trading under the firm and style of Caldwell & Shannon, by their attorney, and sued out of the clerk's office of the circuit court of the city of Richmond a writ of summons ad respondendum against Gustavus Lersner and Robt. B. Bolling; which, together with the endorsements thereon, is in the words and figures following, to wit:

The Commonwealth of Virginia to the sheriff of the , greeting:

We command you that you summon Gustavus Lersner and Robert B. Bolling to appear at the clerk's office of the circuit court of the city of Richmond, at the rules to be holden for the said court on the first Monday in Aug. next, to answer the action of Milton Caldwell and Ed. B. Shannon, merchants and partners trading under the style and firm of Caldwell & Shannon, of a plea of debt for seven hundred pounds sterling money of Great Britain, with interest thereon from the 10th
284 day of October, 1863, till paid, and $12 charges of protest. Damages seventy thousand dollars. And have then there this writ. Witness Benjamin Pollard, clerk of our said court at Richmond, the 29th day of June, 1864, and in the 88th year of the Commonwealth.

BENJ. POLLARD.

(Endorsed:) This is an action of debt founded upon bills of exchange drawn by the defendant, Gustavus Lersner, upon Robert Rea & Co., Liverpool, in Great Britain, payable to the order of the defendant, Robert B. Bolling, one for the sum of three hundred pounds sterling, and the other for the sum of £400 sterling, which bills were endorsed by the defendant, Robert B. Bolling, and made payable to the order of the plaintiffs, and have been protested for non-acceptance. By order of the attorney for the plaintiffs. Teste: Benjamin Pollard, clerk. James Alfred Jones, p. q.

We acknowledge legal service of the within.

GUSTAVUS LERSNER.
ROBERT B. BOLLING.
Per J. R. TUCKER,
Their Attorney.

And at another day, to wit, at rules held in the clerk's office of the said court, on the first Monday in August, 1864, this cause was continued for declaration.

And at another day, to wit, at rules held in the clerk's office of the said court, on the first Monday in September, 1864, this cause was further continued for declaration.

And at another day, to wit, at rules held in the clerk's office of the said court, on the first Monday in October, 1864, came the plaintiffs, by their attorneys, and filed their declaration against the defendants; which is in the words and figures following, to wit:

In the Hustings court of the city of Richmond.

CITY OF RICHMOND, *sct:*

285 Caldwell and Shannon, merchants and partners under the firm and style of Caldwell and Shannon, plaintiffs, complain of Gustavus Lersner and Robert Rea and , partners under the

firm of Robert Rea & Co., and Robert B. Bolling, defendants, summoned to answer of a plea of trespass on the case in assumpsit. For that whereas the said G. Lersner heretofore, to wit, in the city of Richmond, on the 18th April, 1863, according to the usage and custom of merchants, made his two certain bills of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bills to the said Robert Rea & Co., by the name and addition of Robert Rea & Co., provision-dealers, Liverpool, by one of which said bills of exchange he, the said G. Lersner, then and there requested the said Robert Rea & Co., sixty days after sight thereof, first and second of same tenor and date not paid, to pay to the order of R. B. Bolling the sum of £400 sterling, value received, and by the other of which said bills of exchange he, the said G. Lersner, then and there requested the said Robert Rea & Co., sixty days after sight thereof, first and second of same tenor and date not paid, to pay to the order of R. B. Bolling the sum of £400 sterling, value received, and then and there delivered the said two bills of exchange to the said R. B. Bolling, and the said R. B. Bolling, to wit, on the said 18th April, 1863, at the city of Petersburg, to wit, at the city of Richmond aforesaid, endorsed said bills of exchange, by which said endorsements he, the said R. B. Bolling, then and there ordered the said sum of money in the said bills of exchange mentioned to be paid to the said plaintiffs, and then and there delivered the said bills of exchange so endorsed as aforesaid to the said plaintiffs; and the said plaintiffs further say that the said bills of exchange being wholly unaccepted and unpaid, they, the said plaintiffs, afterwards, to wit, on the said 18th April, 1863, to wit, at the city of Liverpool, to wit, at the city of Richmond aforesaid, caused the said bills of exchange to be presented and shown to the said Robt. Rea & Co. for their acceptance thereof, according to the usage and custom of merchants, and the said Robert Rea & Co. were then and there requested to accept the same, but that the said Robt. Rea & Co. then and there wholly rejected and refused to do so, and thereupon, afterwards, to wit, on the 10th day of August, in the year 1863, at the city of Liverpool aforesaid, the said bills of exchange were duly protested for non-acceptance thereof, according to the usage and custom of merchants, where-
286 of the said defendants, afterwards, to wit, on the 10th August, 1863, at the city of Richmond aforesaid, had notice, by reason whereof, and also by the usuage and custom of merchants, the said defendants then and there became liable to pay to the said plaintiffs, when *he*, the said defendants, should be thereunto afterwards required, the said two sums of the bills of exchange specified, to wit, the two sums of three hundred pounds sterling, and four hundred pounds sterling, making in the aggregate seven hundred pounds sterling, equivalent to and equal with thirty-five hundred dollars in good and lawful money in specie of the Confederate States, and of the State of Virginia; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the 10th day of August, in the year 1863, at the city of Richmond aforesaid, undertook, and then and there faithfully promised the said plaintiffs, to pay them the said sums of money in the said bills of exchange specified when they, the said defendants, should be thereunto afterwards requested. Yet the said plaintiffs, in fact, say that the said defendants did not, nor would, at the said time, when they were so requested as aforesaid, or at any time afterwards, pay to the said plaintiffs, or either of them, the said sums of money in the said bills of exchange specified, amounting in the aggregate to seven hundred pounds sterling aforesaid, being, as aforesaid, the equivalent of, and equal to, thirty-five

hundred dollars in specie, good and lawful money of the Confederate States, and of the State of Virginia. But to pay the said sums of money, or any part thereof, to the said plaintiffs, or either of them, they, the said defendants, and each of them, have hitherto wholly refused, and still fail and refuse, to the damage of the said plaintiffs, $, and therefore they, the said plaintiffs, bring their suit, &c.

J. A. JONES, *P. Q.*

Whereupon, the defendants being summoned and not appearing, on the motion of the plaintiffs, by their attorney, it was ordered that judgment be entered for the said plaintiffs against the defendants for what damages the plaintiffs ought to recover, unless the defendants should appear at the then next rules, and answer the plaintiffs' action.

At which day, to wit, at rules held in the clerk's office of the said court on the last Monday in October, 1864, came as well the plaintiffs as the defendants, by their attorneys, and thereupon the defendants
287 pleaded non-assumpsit, and put themselves upon the country, and the plaintiffs did the like; whereupon it was ordered that the plaintiffs' damages be ascertained by a jury at the then next term.

And at another day, to wit, at a circuit court of the city of Richmond, held at the State court-house in the said city, on the 7th day of March, 1865, came again the parties, by their attorneys, and on the motion of the plaintiffs, leave was given them to amend their declaration, on their paying to the defendants the costs occasioned to them by such amendment; and thereupon the said plaintiffs filed an amended declaration; which is in the words and figures following:

In the circuit court of the city of Richmond.

CITY OF RICHMOND, *to wit:*

Milton Caldwell and Edward B. Shannon, merchants and partners trading under the firm and style of Caldwell & Shannon, plaintiffs, complain of Gustavus Lersner and Robt. B. Bolling, defendants, who have been duly summoned to answer the plaintiffs in behalf of a plea that the said defendants render to the said plaintiffs three thousand and eighty-three pounds and eight shillings sterling money of Great Britain, with legal interest on two thousand eight hundred and one pounds and fourteen shillings, part of the first-mentioned sum, from the 10th day of August, 1863, until paid, which to the plaintiffs the said defendants owe, and from them unjustly detain.

1ST COUNT.—And thereupon the plaintiffs say that heretofore, to wit, on the 18th day of April, 1864, at the city of Richmond, and within the jurisdiction of this court, the defendant, G. Lersner, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robt. Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robt. Rea & Co., sixty days after sight of that, his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, R. B. Bolling, by the style of R. B. Bolling, three hundred pounds sterling, parcel of the debt demanded for value received, and to charge the same to account of him, G. Lersner, and then and there by memorandum in writing on the margin of said bill of exchange, which said memo. was then and there made and subscribed by the said G. Lersner, directed that in case of non-payment, the said bill of exchange was to be honored by Crow, Wylie & Co., India Building, Liverpool, and then and there
288 delivered the said bill of exchange and the memo. made on the

margin thereof as aforesaid to the said R. B. Bolling, and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid; and the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the same day and year aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there, by that endorsement, ordered and appointed the payment of the sum of money specified in the said bill of exchange to be made to the order of the plaintiffs by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange, together with the aforesaid memo. on the margin thereof. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or either the second or third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs was made after the said Robt. Rae & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robt. Rea & Co. for their acceptance of the same; but that upon the search and enquiry so made as aforesaid neither the said Robt. Rea & Co. nor any member nor any agent of any such firm or partnership could be found at Liverpool aforesaid, or elsewhere; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which protest amount to eight shillings and sixpence sterling money of Great Britain, of all which said premises, and especially of the protest of the bill hereinbefore mentioned, the said defendants afterwards, to wit, on the day of October, 1863, at Richmond, Virginia, had due notice.

And the plaintiffs further say that heretofore, to wit on the said 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the defendant, G. Lersner, made his certain other bill of exchange in writing bearing date the day and year last aforesaid, and then and there directed the same to Robert Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robt. Rea & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, four hundred pounds sterling, another parcel of the debt demanded, for value received, and to charge the same to account of him, the said G. Lersner, and then and thereby a memo. in writing in the margin of the said bill of exchange, which said memo. was then and there made and subscribed by the said G. Lersner, directed that in case of non-payment the said bill of exchange was to be honored by Messrs. Crow, Wylie & Co., India Building, Liverpool, and then and there delivered the said bill of exchange and the memo. made in the margin thereof as aforesaid to the said R. B. Bolling, and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid; and the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or third of the same tenor and date, to wit, on

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the same day and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there, by that endorsement, ordered and appointed the payment of the sum of money specified in the said bill of exchange to be paid to the plaintiffs' order, by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange, together with the aforesaid memo. in the margin thereof; and the said plaintiffs aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool aforesaid, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs was made after the said Robert Rea & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robert Rea & Co. for their acceptance of the same, but that upon the search and enquiry so made as aforesaid neither the said Rea & Co. nor any member of such firm or partnership as Robert Rea & Co., nor any agent of any such firm or partnership could be found in Liverpool aforesaid or elsewhere, and thereupon, afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which last-
290 mentioned protest amount to eight shillings and sixpence sterling money of Great Britain, of all which said promises, and especially of the protest of the two bills hereinbefore mentioned, and of each of them, the said defendants afterwards, to wit, on the day of October, 1868, at Richmond, Va., had due notice.

SECOND COUNT.—And the plaintiffs further say that heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the said G. Lersner made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robt. Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robt. Rea & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, three hundred pounds sterling, another parcel of the debt demanded for value received, and to charge the same to account of him, the said G. Lersner, and then and there delivered the said bill of exchange to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid; and the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the same day and year aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there by that endorsement ordered and appointed the payment of the sum of money specified in the said bill of exchange to be made to the order of the plaintiffs by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or either the second or third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs was made after the said Robt.

Rae & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robt. Rea & Co. for their acceptance of the same; but that upon the search and enquiry so made as aforesaid, neither the said Robt. Rea & Co., nor any
291 member, nor any agent of any such firm or partnership, could be found at Liverpool aforesaid, or elsewhere; and thereupon, afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which protest amount to eight shillings and sixpence sterling, money of Great Britain; of all which said premises, and especially of the protest of the bill hereinbefore mentioned, the said defendant afterwards, to wit, on the day of October, 1863, at Richmond, Va., had due notice. And said plaintiffs further say that heretofore, to wit, on the said 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, G. Lersner made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robt. Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robt. Rea & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, four hundred pounds sterling, another parcel of the debt demanded, for value received, and to charge the same to account of him, the said G. Lersner, and then and there delivered the said bill of exchange to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid, and the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there by that endorsement ordered and appointed the payment of the sum of money specified in the said bill of exchange to the plaintiffs' order, by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange; and the said plaintiffs aver that afterwards and before any acceptance or payment of the said bill of exchange, or of either the second or third of same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool aforesaid, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs was made after the said Robt. Rea & Co., the drawees in the said bill of exchange, in order
292 that the said bill might be presented and shown to the said Robt. Rea & Co., for their acceptance of the same, but that upon the search and inquiry so made as aforesaid, neither the said Robt. Rea & Co., nor any member of any such firm or partnership as Robert Rea & Co., nor any agent of any such firm or partnership, could be found at Liverpool or elsewhere; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which last-mentioned protest amount to eight shillings and six pence sterling, money of Great Britain, all of which said premises, and especially of the protest of the two bills hereinbefore mentioned, and of each of them, the said defendants, to wit, on the day of October, 1863, at Richmond, Va., had due notice.

THIRD COUNT.—And the plaintiffs further say that heretofore, to wit,

on the 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the said G. Lersner made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then there directed the same to Robt. Rae & Co., provision-dealers, Liverpool, and thereby then and there required the said Robt. Rae & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, three hundred pounds sterling, another parcel of the debt demanded or value received, and to charge the same to account of him, the said G. Lersner, and then and there, by a memo. in writing in the margin of the said bill of exchange, which said memo. was then and there made and subscribed by the said G. Lersner, directed that in case of non-payment the said bill of exchange was to be honored by Crow, Wylie & Co., India Buildings, Liverpool, and then and there delivered the said bill of exchange and memo. made in the margin thereof, as aforesaid, to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid; and the plaintiffs further aver that afterwards and before any acceptance or payment of the said bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling
293 endorsed the said bill of exchange, and then and there by that endorsement, ordered and appointed the day of payment of the said sum of money specified in the said bill of exchange, to be made to the order of the plaintiffs by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange, together with the aforesaid memo. in the margin thereof; and the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or third of same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool, and at all usual and proper quarters diligent search and enquiry on behalf of the plaintiffs was made after the said Robt. Rea & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robert Rea & Co. for their acceptance of the same, but that upon the search and enquiry so made as aforesaid, neither the said Robert Rea & Co., nor any member, nor any agent of any such firm or partnership, could be found at Liverpool aforesaid or elsewhere; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charge of which protest amount to eight shillings and sixpence sterling, money of Great Britain. And the plaintiffs further say that heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the defendant, G. Lersner, made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robert Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robert Rea & Co., sixty days after sight of that his first of exchange (second and third of same tenor and date unpaid) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, £400 sterling, another parcel of the debt demanded for value received, and to charge the same to account of him the said G. Lersner, and then and there, by a memo. in writing in the margin of the said bill of exchange, which said memo.

was then and there subscribed by the said Gustavus Lersner, directed that in case of non-payment, the said bill of exchange was to be honored by Messrs. Crow, Wylie & Co., India Buildings, Liverpool, and then and there directed the said bill of exchange and the memo. made in the margin thereof, as aforesaid, to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which said bill of exchange was addressed and directed as
294 aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid and the plaintiffs further aver, that afterwards and before any acceptance or payment of the said bill of exchange, or of either the second or third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there by that endorsement ordered and appointed the payment of the sum of money specified in the said bill of exchange to be made to the plaintiffs' order, by the style of Caldwell & Shannon, and then delivered to the plaintiffs the said bill of exchange, together with the aforesaid memo. in the margin thereof. And the plaintiffs aver that afterwards, and before any acceptance or payment of the said bill of exchange or of either the second or third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool aforesaid, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs was made after the said Robert Rea & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robert Rea & Co. for their acceptance of the same, but that upon the search and enquiry, so made as aforesaid, neither the said Robert Rea & Co., nor any member of any such firm or partnership, could be found at Liverpool aforesaid or elsewhere; and thereupon afterwards, to wit, on the same day and year aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which last-mentioned protest amount to eight shillings and sixpence sterling, money of Great Britain; of all which said premises, and especially of the protest of the two bills herein before mentioned, and of each of them, the said defendants afterwards, to wit, on the day of October, 1863, at Richmond, Va., had due notice. And the plaintiffs further aver that neither at the time when the aforementioned bills were drawn as aforesaid, nor at any time afterwards, and before the same were protested, had the said Robert Rea & Co., upon whom the same were drawn as aforesaid, or the said Crow, Wylie & Co., the referees named in the memo. written as aforesaid in the margin of the same, any effects of the defendant, G. Lersner, in their hands, nor had the said defendant, G. Lersner, ever any reasonable ground for believing or expecting that he had or could have any effects in the hands of either the said drawees or the said referees, or that
295 either the said drawees or the said referees would accept the beforementioned bills, or either of them, or any part of either, nor was there any consideration or value for the acceptance of the said bills, or either of them, or for the payment of the amount of the same or of any part thereof by either the said drawees or the said referees, nor has the said defendant, Gustavus Lersner, sustained any damage by reason of his not having had notice of the non-acceptance of the said bills; and the said plaintiffs aver further that at the time when the bills aforesaid were drawn as aforesaid, and thenceforth when the same were protested, the defendant, R. B. Bolling, had in his hands and under his control, and he has thenceforward hitherto had in his hands and under

his control, and he yet has property and effects of the defendant, G. Lersner, fully sufficient to discharge the amount claimed as due to plaintiffs upon the said bills, and which said property and effects the said R. B. Bolling might at the time when or at any time since the said bills were protested as aforesaid have legally and properly applied, and ought heretofore to have applied, and still may legally and properly apply, and ought to apply, in paying to the plaintiffs the amount they claim as due to them upon the said bills, and the said R. B. Bolling has not sustained any damage by reason of his not having had notice of the non-acceptance of the bills aforesaid by the drawees aforesaid. And the plaintiffs further aver that the said R. B. Bolling had not at the time when the bills of exchange aforesaid were drawn and delivered to him, nor at the time when the same were endorsed and delivered by him to the plaintiffs as aforesaid, any reasonable ground for believing or expecting, nor did he in fact believe or expect, that the same or either of them would be accepted or paid by either the drawees named therein or the referees named in the said memoranda in the margin thereof written.

And the plaintiffs further say that heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the said G. Lersner made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then there directed the same to Robert Rea & Co., provision-dealers, Liverpool, and thereby then and there requested the said Robt. Rea & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, by the style of R. B. Bolling, three hundred pounds sterling, another parcel of the debt demanded for value received, and to charge the same to account of him, the said G. Lersner, and then and there, by a memo.
296 in writing in the margin of the said bill of exchange, which said memo. was then and there subscribed and made by the said G. Lersner, directed that in case of non-payment, the said bill of exchange was to be honored by Crow, Wylie & Co., India Buildings, Liverpool, and then and there delivered the said bill of exchange, and the memo. made in the margin thereof as aforesaid, to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid; and the plaintiffs further aver that afterwards, and before any acceptance and payment of the said bill of exchange, or of either the second or third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, and with the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there by that endorsement ordered and appointed the day of payment of the sum of money specified in the said bill of exchange, to be made to the order of the plaintiffs, by the style of Caldwell & Shannon, and then and there delivered to the plaintiffs the said bill of exchange, together with the aforesaid memo. in the margin thereof. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange or of either the second or the third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool, and at all usual and proper quarters, diligent search and inquiry on behalf of the plaintiffs was made after the said Robt. Rae & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robt. Rae & Co., the drawees in the said bill of exchange, for their acceptance of the same, but that upon the search and enquiry so made as aforesaid,

neither the said Robt. Rae & Co., nor any member, nor any agent of any such firm or partnership, could be found at Liverpool aforesaid, or elsewhere; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance, the charges of which protest amount to eight shillings and sixpence sterling, money of Great Britain.

And the plaintiffs further say that heretofore, to wit, on the said 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the defendant, G. Lersner, made his certain other bill of exchange in writing, bearing date the day and year last afore-
297 said, and then and there directed the same to Robt. Rae & Co., provision-dealers, Liverpool, and thereby then and there required the said Robert Rae & Co., sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, £400 sterling, another parcel of the debt demanded, for value received, and to charge the same to account of him, the said G. Lersner, and then and there, by a memorandum in writing in the margin of the said bill of exchange, which said memo. was then and there subscribed by the said G. Lersner, directed that in the case of non-payment, the said bill of exchange was to be honored by Messrs. Crow, Wylie & Co., India Buildings, Liverpool; and then and there delivered the said bill of exchange and the memo. made in the margin thereof as aforesaid to the said R. B. Bolling; and the plaintiffs aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bills of exchange, or of either the second or third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there by that endorsement ordered and appointed the payment of the sum of money specified in the said bill of exchange to be made to the plaintiffs' order, by the style of Caldwell & Shannon, and there delivered to the plaintiffs the said bill of exchange together with the aforesaid memo. in the margin thereof. And the plaintiffs aver that afterwards, and before any acceptance or payment of the said bill of exchange, or either the second and third of the same tenor and date, to wit, on the 10th day of August, 1863, at Liverpool aforesaid, and at all usual and proper quarters, diligent search and enquiry on behalf of the plaintiffs were made after the said Robt. Rae & Co., the drawees of the said bill of exchange, in order that the said might be presented to the said Robt. Rae & Co., for their acceptance of the same, but that upon the search and enquiry so made as aforesaid, neither the said Robt. Rae & Co., nor any agent of any such firm or partnership, could be found at Liverpool aforesaid, or elsewhere; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool, aforesaid, the said bill of exchange was
298 duly protested for non-acceptance, the charges of which last-mentioned protest amount to eight shillings and sixpence sterling, money of Great Britain, of all which premises and especially of the protest of the two bills hereinbefore mentioned, and each of them, the said defendant, Robert B. Bolling afterwards, to wit, on the day of October, 1863, at Richmond, Va., had due notice.

And the said plaintiffs further aver that the said supposed firm of Robert Rae & Co. is wholly fictitious, and had no existence in the said

city of Liverpool, as the said Gustavus Lersner, defendant as aforesaid, well knew when the bill of exchange aforesaid was drawn, but that he contrived and devised the said bill to deceive and defraud those who in the course of trade might become the legal holders thereof. By means of all which premises and by force of the act of the general assembly in such case made and provided, an action hath accrued to the pltffs. to demand and have of and from said the defts., the principal sum of twenty-eight hundred pounds sterling, money of Great Britain, and damages thereon at the rate of ten per centum, and charges of protest, amounting to one pound and fourteen shillings sterling money aforesaid, and legal interest on the principal sum and charges of protest aforesaid from the 10th day of August, 1863, (the date of the protest for non-acceptance hereinbefore set forth,) until paid, the aggregate of which several sums of principal money, damages thereon, and charges of protest, is the sum of three thousand and eighty-three pounds and eight shillings sterling, money of Great Britain herein above demanded, and which said amount of interest is the interest hereinabove demanded.

Yet the said defts., although often requested, have not, nor hath either of them, paid to the pltffs. the said sum of money and interest hereinabove demanded, or any part thereof, but to pay the same or any part thereof they, the said defts., have hitherto constantly refused, and still do refuse, to the further damage of the pltffs. of seven hundred pounds sterling, money of Great Britain, and therefore they bring suit, &c.

JAMES ALFRED JONES, *P. Q.*

And thereupon the cause was remanded to rules for further proceedings to be had therein. And this cause was thenceforward continued until the first rules-day in October, 1865, at which day, to wit:

At rules held in the clerk's office of the said court, on the first Monday in October, 1865, the defts. being summoned and not appearing, on the motion of the pltffs., by their attorneys, it was ordered
299 that judgment be entered for the said pltffs. against the defts. for what damages the pltffs. ought to recover unless the defts. should appear at the then next rules, and answer the pltffs.' action.

At which day, to wit, at rules held in the clerk's office of the said court on the last Monday in October, 1865, the defts. still failing to appear, on the motion of the pltffs., by their attorneys, it was ordered that the conditional judgment entered in this cause at the last rules be confirmed, and that the pltffs.' damages be ascertained by a jury at the then next rules.

And now, at this day, to wit, at a circuit court of the city, of Richmond, held at the State capital, in the said city, on the said 16th day of March, 1866, (being the day and year first herein written,) came the parties, by their attorneys, and thereupon the pltffs.' counsel, in open court, acknowledged that since the last regular term, to wit, on the 3d day of June, 1865, the deft. Bolling, as endorser of the bills of exchange in the declaration mentioned, paid them the principal and charges of protest of said bills, with interest thereon from the date of said protest; and satisfied them for whatever else he was liable for; and by consent it was ordered that this suit be dismissed.

A transcript of the record.

Teste:

BENJAMIN POLLARD, *Clerk.*

Another paper filed by pltffs.' counsel, on the said 13th September, 1866, is in these words:

Pleas at the court-house of the city of Richmond, before the Hon. Wm. H. Lyons, judge of court of hustings thereof, on the 3d day of May, 1864.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the said court on the 2d day of May, 1864, came George A. Trenholm, Thomas D. Wagner, C. K. Prialeau, G. T. Welsman, and W. L. Trenholm, merchants and partners, trading under the firm and style of Fraser, Trenholm & Co., by Messrs. Macfarland Roberts, their
300 counsel, and filed their declaration against Gustavus Lersner and Robert B. Bolling; which declaration is in the words and figures following:

In Richmond hustings court, May rules, 1864.

George A. Trenholm, Thomas D. Wagner, C. K. Prialeau, G. T. Welsman, and W. L. Trenholm, merchants and partners, trading under the firm and style of Fraser, Trenholm & Co., complain of Gustavus Lersner and Robert B. Bolling, of a plea of debt for £551 5s. 6d. sterling, money of Great Britain, with legal interest on £501 5s. 6d. sterling, part thereof, from the 2d day of September, 1863, till paid, which to the pltffs. the defts. owe and from them unjustly detain: For that heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, in Virginia, the said Gustavus Lersner made his certain bill of exchange in writing, the date whereof is the day and year last aforesaid, and subscribed his name thereto, and thereby required Robert Rae & Co. provision-dealers in Liverpool, to whom the said bill was directed, sixty days after sight of that his first of exhange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant, R. B. Bolling, £500 sterling, for value received, and charge the same to the account of the said Gustavus Lersner, and on the margin of the said bill the said Lersner made a memo. in writing, and subscribed his name thereto, to the effect that in case of non-payment, the said bill was to be honored by Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool. And the pltffs. aver that the said city of Liverpool, where the said bill was made payable, is in Great Britain aforesaid, and without the limits both of the United States and the Confederate States of America; and the said deft., R. B. Bolling, afterwards, to wit, on the day , at Richmond, aforesaid, within the State of Virginia, endorsed the said bill to the pltffs., and subscribed his name to the said endorsement; and afterwards, on the 2d day of September, 1863, in the city of Liverpool aforesaid, (the said bill as well as the said second and third of exchange therein mentioned, then and there being wholly unaccepted and unpaid,) diligent search and enquiry were made on the part of the pltffs. to find the said Robt. Rae & Co., the drawees in the said bill, that the same might be duly presented and shown to them, but no such firm, nor any member thereof, nor any one representing the same, was or could be found
301 or heard of within the said city of Liverpool or elsewhere, whereupon the said bill (which, as well as the second and third therein mentioned, being wholly unaccepted and unpaid) was then and there, to wit, at the date and place last aforesaid, presented on the part of the pltffs. to the firm of Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool, to whom, in case of non-acceptance, reference was by

the said marginal memorandum directed to be made, with the request that they would honor and pay the said bill according to the tenor and effect of the said memo., but they refused to honor the same, and declared that it would not be paid by them; and the said bill was then and there, to wit, at the date and place last aforesaid, duly protested, and the charges of which protest amounting to £1 5s. 6d. sterling, were then and there paid by the said pltffs., of all which premises, and especially of the said protest, the defts. had due notice. By virtue whereof the defts. are liable to the pltffs., who have right of action against them, for the principal and charges of protest aforesaid, with interest thereon from the date of said protest until paid, and for damages upon the said principal at the rate of ten per centum, which said principal sum, charges of protest, and damages together amount to and make up the sum of £551 5s. 6d. sterling money, first herein mentioned.

And for that also heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, in Virginia, the said Gustavus Lersner made his certain other bill of exchange in writing, the date whereof is the day and year last aforesaid, and subscribed his name thereto, and thereby required Robt. Rae & Co., provision-dealers in Liverpool, to whom the said bill was directed, sixty days after sight of that his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the deft., R. B. Bolling, £500 sterling, for value received, and charge the same to the account of the said G. Lersner; and on the margin of the said bill the said Lersner made a memo. in writing, and subscribed his name thereto to the effect that, in case of non-payment, the said bill was to be honored by Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool. And the plaintiffs aver that the city of Liverpool, where the said bill was made payable, is in Great Britain aforesaid, and without the limits both of the Confederate States and the United States of America. And the deft., Robt. B. Bolling, afterwards, to wit, on the day , at Richmond aforesaid, within the State of Virginia, endorsed the said bill to the pltffs., and subscribed his name to the said endorsement; and afterwards, on the 2d day of
302 Sept., 1863, in the city of Liverpool aforesaid, (the said bill as well as the said second and third of exchange therein mentioned, being wholly unaccepted and unpaid,) diligent search and enquiry were made on the part of the pltffs. for the said Robt. Rae & Co., the drawees in said bill, that the same might be duly presented to them, but no such firm, nor any member thereof, could be found or heard of within the said city of Liverpool, or elsewhere. And the pltffs. aver that the said supposed firm of Robt. Rae & Co. is wholly fictitious, and had no existence in the said city of Liverpool, as the deft. Lersner well knew when the bill of exchange aforesaid was drawn, but that he contrived and devised the said bill to deceive and defraud those who, in the course of trade, might become the legal holders thereof. Whereupon afterwards, to wit, at the date and place last aforesaid, the said bill was on the part of the pltffs. presented to the firm of Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool, to whom, in case of non-payment, reference was by the said marginal memo. directed to be made, with the request that they would honor and pay the said bill according to the tenor and effect of the said memo., but they refused to honor the same, and declared that it would not be paid by them. And the said bill was thereupon duly protested for non-payment, the charges of which protest amounts to £1 5s. 6d. sterling; of all which premises, and especially of the said protest, the deft. R. B. Bolling, had due notice. By virtue whereof, the said detts. are liable to the pltffs., who, in consequence, have

right of action against them for the principal and charges of protest aforesaid, with interest thereon from the date of said protest until paid, and for damages upon the said principal at the rate of ten per centum, which said principal sum, charges of protest, and damages together amount to the sum of £551 5s. 6d. sterling money, first herein mentioned.

And the pltffs. aver that the said several sums of money hereinbefore mentioned, and every part thereof, remain still due and unpaid, and from the neglect and refusal of the defts. to pay the same, the pltffs. have received further damage to the amount of £100 sterling, and therefore they bring suit.

MACFARLAND & ROBERTS, *P. Q.*

Whereupon the defendants being summon'd and not appearing, on the motion of the pltffs. by their attorneys, it was ordered that judg-
303 ment be entered for the said pltffs. against the defendants for what should appear to be justly due to the said pltffs., unless the defts. should appear at the next rules and answer the plaintiffs' action.

At which day, to wit, at rules held in the clerk's office of the said court, on the first Monday in June, 1864, being the 6th day of the month, the defendants still failing to appear, on the motion of the pltffs., by their attorneys, it was ordered that the conditional judgment entered in this cause at the last rules stand confirmed.

And at another day, to wit, at a court of hustings held for the said city, at the court-house, on the 4th day of August, 1864, came the parties by their attorneys, and the defendants entered a general demurrer to the plaintiffs' declarations, and to each count therein, and the plaintiffs joined in the said demurrers.

And now at this day, to wit, at a court of hustings held for the said city, at the court-house, on the 3d day of November, 1864, (being the same day and year first herein written,) by consent of the parties, by their attorneys, the demurrer of the defts. heretofore filed to the declaration of the pltffs. and the joinder of the pltffs. in the said demurrer, are withdrawn; and pltffs., by their attorneys, with the leave of the court, filed an amendment to their declaration, consisting of two counts, thereto; which amended declaration is in the words and figures following, to wit:

In the court of hustings for the city of Richmond, held by the Hon. Wm. H. Lyons, the judge of the said court.

CITY OF RICHMOND, *to wit:*

George A. Trenholm, Thomas D. Wagner, C. K. Prialeau, J. T. Welsman, and W. L. Trenholm, merchants and partners, trading under the firm and style of Fraser, Trenholm & Co., complain of Gustavus Lersner & Robert B. Bolling, defts., who have been duly summoned to answer the pltffs. in this behalf of a plea, that the said defts. render to the said pltffs. five hundred and fifty-one pounds, five shillings and six pence, sterling money of Great Britain, with legal interest on five hundred and one pounds, five shillings and sixpence, sterling money aforesaid, part of the first-mentioned sum, from the second day of September, 1863, till paid, which to the pltffs. the said defs. owe and from them unjustly
304 detain; and thereupon the pltffs. say that heretofore, to wit, on the

18th day of April, 1863, at the city of Richmond and within the jurisdiction of this court, the deft., Gustavus Lersner, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robert Rea & Co., provision-dealers, Liverpool, and thereby then and there required the said Robert Rea & Co., sixty days after sight of that his first of exchange (second and third of same tenor and date unpaid) to pay to the order of the defendant, Robert B. Bolling, by the style of R. B. Bolling, five hundred pounds sterling, for value received, and to charge the same to account of him, the said G. Lersner, and then and there, by a memorandum in writing in the margin of the said bill of exchange, which said memo. was then and there made and subscribed by the said Gustavus Lersner, directed that, in case of non-payment, the said bill of exchange was to be honored by Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool; and then and there delivered the said bill of exchange, and the memo. made in the margin thereof as aforesaid, to the said R. B. Bolling. And the pltffs. aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limit of the Confederate States of America, to wit, in Great Britain aforesaid. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the same date and year last aforesaid, at Richmond aforesaid, and within the jurisdiction of this court, the said R. B. Bolling endorsed the said bill of exchange, and then and there, by that endorsement, ordered and appointed the payment of the sum of money specified in the said bill of exchange to be made to the plaintiffs, by the style of Messrs. Fraser, Trenholm & Co., or to their order, and then and there delivered to the pltffs. the said bill of exchange together with the aforesaid memo. in the margin thereof. And the pltffs. further aver that afterwards, and before any acceptance or payment of the said bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the 31 day of July, 1863, at Liverpool aforesaid, and elsewhere, diligent search and enquiry on behalf of the pltff. was made after the said Robert Rae & Co., the drawees in the said bill of exchange, in order that the said bill might be presented and shown to the said Robert Rae & Co.,
for their acceptance of the same, but that upon the search and
305 enquiry so made as aforesaid, neither the said Robert Rae & Co.,
nor any member of any such firm or partnership as Robert Rea & Co., nor any agent of any such firm or partnership, could be found at Liverpool aforesaid or elsewhere; whereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange, (the same, as well as the second and third of the same tenor and date being wholly unaccepted and unpaid,) was, on behalf of the pltffs., duly presented and shown to the said Crow, Wylie & Co., and they, the said Crow, Wylie & Co., were then and there duly required to accept the said bill of exchange, pursuant to the tenor and effect of the aforesaid memo. in the margin of the said bill, but the said Crow, Wylie & Co. then and there wholly refused to accept the said bill; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-acceptance; all of which said premises, and especially of the said protest, the said defts. afterwards, to wit, on the 29th day of October, 1863, at Richmond aforesaid, had due notice. And the pltffs. further aver that afterwards when, according to the tenor and effect of the said bill of exchange, and by force of the failure to find the said

drawees, upon search and inquiry made as aforesaid, and of the refusal of the said referees, Crow, Wylie & Co., to accept the said bill as aforesaid, the said bill had become payable, and the payment thereof demandable, to wit, on the second day of September, 1863, diligent search and enquiry was again made on behalf of the plaintiffs at Liverpool aforesaid, and elsewhere, after the said drawees, Robert Rae & Co., in order that the said bill of exchange might be presented and shown to them the said Robert Rea Co. for payment thereof, but that upon the last-mentioned search and enquiry, neither the said Robert Rea & Co., nor any member or partner or agent of the said Robert Rae & Co., could be found at Liverpool aforesaid or elsewhere; whereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange (the same as well as the second and third of the same tenor and date being still wholly unpaid) was, on behalf of the pltffs., duly presented and shown to the said Crow, Wylie & Co., and they the said Crow, Wylie & Co. were then and there duly required to pay the sum of money in the said bill of exchange specified, pursuant to the tenor and effect of the aforesaid memo. in the margin of the said bill, but the said Crow, Wylie & Co. then and there wholly refused to pay the said sum of money in the said bill specified, or any part
306 thereof; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the said bill of exchange was duly protested for non-payment, the charges of which last-mentioned protest amount to one pound five shillings and sixpence sterling money of Great Britain; of all which last-mentioned premises, and especially of the last-mentioned protest, the said defts. afterwards, to wit, on the 29th day of October, 1863 at Richmond aforesaid, had due notice.

And the pltffs. further say, that heretofore, to wit, on the 18th day of April, 1863, at the city of Richmond, and within the jurisdiction of this court, the said G. Lersner made his certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the same to Robert Rea & Co., provision dealers, Liverpool, and thereby then and there required the said Robert Rea & Co., sixty days after sight of that, his first of exchange, (second and third of same tenor and date unpaid,) to pay to the order of the defendant Robert B. Bolling, by the style of R. B. Bolling, five hundred pounds sterling, for value received, and to charge the same to account of him the said G. Lersner, and then and there made a memorandum in writing in the margin of the said bill of exchange, importing that in case of non-payment the said bill of exchange was to be honored by Messrs. Crow, Wylie & Co., 3 India Buildings, Liverpool, and then and there delivered the said bill of exchange, with the memo. thereto annexed as aforesaid, to the said R. B. Bolling. And the pltffs. aver that Liverpool aforesaid, the place to which the said bill of exchange was addressed and directed as aforesaid, is a place in foreign parts, beyond the limits of the Confederate States of America, to wit, in Great Britain aforesaid. And the plaintiffs further aver that afterwards, and before any acceptance or payment of the last-mentioned bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the same day and year last aforesaid, at Richmond aforesaid, the said R. B. Bolling endorsed the said bill of exchange last mentioned, and then and there, by that endorsement, ordered and appointed the payment of the sum of money specified in that bill to be made to the *to the* plaintiffs, by the style of Messrs. Fraser, Trenholm & Co., or to their order, and then and there delivered to the pltffs. the last-mentioned bill of exchange, together with the afore-

said memo. in the margin of the same. And the pltffs. further aver
307 that afterwards, and before any acceptance or payment of the last-mentioned bill of exchange, or of either the second or the third of the same tenor and date, to wit, on the 3d day of July, 1863, diligent search and enquiry on behalf of the pltffs. was made at Liverpool aforesaid, and elsewhere, after the said Robert Rae & Co., the drawees in the last-mentioned bill of exchange, in order that the last-mentioned bill might be presented and shown to them for their acceptance thereof, but that, upon the search and enquiry last aforesaid, neither the said Robert Rae & Co. nor any member nor any partner or agent of the said Robert Rea & Co. could be found at Liverpool aforesaid or elsewhere; whereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the last-mentioned bill of exchange (the same as well as the second and third of the same tenor and date being still wholly unaccepted and unpaid) was duly presented and shown on behalf of the pltffs. to the said Crow, Wylie & Co., and they the said Crow, Wylie & Co., were then and there duly required to accept the said bill last-mentioned, pursuant to the tenor and effect of the memo. aforesaid in the margin thereof written, but the said Crow, Wylie & Co. then and there wholly refused to accept the last-mentioned bill; and thereupon afterwards, to wit, on the same day and year last aforesaid, at Liverpool aforesaid, the last-mentioned bill of exchange was duly protested for non-acceptance; and the pltffs. further aver that afterwards, when the last-mentioned bill of exchange became payable, and the payment thereof demandable, to wit, on the second day of September, 1863, diligent search and enquiry was again made on behalf of the plaintiffs at Liverpool aforesaid, and elsewhere, after the said Robert Rae & Co., in order that the last-mentioned bill of exchange might be presented and shown to them, the said Robert Rea & Co., for payment thereof, but that upon the last-mentioned search and enquiry neither the said Robert Rea & Co., nor any partner or agent of the said Robert Rae & Co., could be found at Liverpool aforesaid or elsewhere; whereupon afterwards, to wit, on the same day and year last afor'said, at Liverpool aforesaid, the last-mentioned bill of exchange (the same as well as the second and third of the same tenor and date being still wholly unpaid) was duly presented and shown on behalf of the pltffs. to the said Crow, Wylie & Co., and they the said Crow, Wylie & Co. were then and there duly required to pay the sum of money in the last-mentioned bill of exchange specified, pursuant to the tenor and effect of the memo. in the margin of that bill written, but the said
308 Crow, Wylie & Co. then and there wholly refused to pay the said sum of money in the last-mentioned bill specified, or any part thereof; and thereupon afterwards, to wit, on the same day and year last mentioned, at Liverpool aforesaid, the last-mentioned bill of exchange was duly protested for non-payment, the notarial charges of which last-mentioned protest amount to one pound five shillings and sixpence sterling money of Great Britain.

And the plaintiffs further aver that neither at the time when the last-mentioned bill was drawn as aforesaid, nor at any time afterwards, and before the same became payable as aforesaid, nor at the time when the same became payable, and was so presented for payment as aforesaid, had the said Robt. Rae & Co., upon whom the same was drawn as aforesaid, or the said Crow, Wylie & Co., the referees named in the memo. written as aforesaid in the margin of the same, any effects of the deft., G. Lersner, in their hands, nor had the said deft., G. Lersner, ever any reasonable ground for believing or expecting that he had or would

have any effects in the hands of either the said drawees or the said referees, or that either the said drawees or the said referees would accept the last-mentioned bill, or pay or discharge any part of the amount of the same, or be provided with funds wherewith they ought to pay the last-mentioned bill, or any part thereof, nor was there any consideration or value for the acceptance of the last-mentioned bill, or for the payment of the amount of the same, or of any part of such amount, by either the said drawees or the said referees; nor has the said defendant, Gustavus Lersner, sustained any damage by reason of his not having had notice of either the non-acceptance or non-payment of the last-mentioned bill by either the said drawees or the said referees.

And the said pltffs. farther aver that at the time when the last-mentioned bill was drawn as aforesaid, and thenceforward until the same became payable as aforesaid, the deft., R. B. Bolling, had in his hands and under his control, and he has thenceforward hitherto had in his hands and under his control, and he yet has in his hands and under his control, property and effects of the deft., G. Lersner, fully sufficient to discharge the amount claimed as due to the pltffs. upon the said last-mentioned bill; and which said property and effects the said R. B. Bolling might at the time when, or at any time since, the last-mentioned bill became payable as aforesaid, have legally and properly applied, and ought heretofore to have applied, and still may legally and properly apply, and ought to apply, in paying to the pltffs. the amount they
309 claim as due to them upon the said last-mentioned bill, and that the said R. B. Bolling has not sustained any damage by reason of not having had notice of either the non-acceptance or non-payment of the last-mentioned bill by either the drawees or referees aforesaid.

And the pltffs. further aver that the said R. B. Bolling had not, at the time when the last-mentioned bill of exchange was drawn and delivered to him as aforesaid, nor at the time when the same was endorsed and delivered by him to the pltffs. as aforesaid, any reasonable ground for believing or expecting, nor did he in fact believe or expect, that the same would be accepted or paid by either the drawees therein named, or the referees named in the said memo. in the margin thereof written.

By means of all which premises, and by force of the act of the general assembly in such case made and provided, an action hath accrued to the pltffs. to demand and have of and from the said defts. the principal sum of five hundred pounds sterling, money of Great Britain, and damages thereon at the rate of ten per centum, and charges of protest, amounting to one pound five shillings and sixpence sterling money aforesaid, and legal interest on the principal sum, and charges of protest aforesaid from the 2d of Sept., 1863, (the date of the protest for non-payment hereinabove set forth,) until paid, the aggregate of which said several amounts of principal money, damages thereon, and charges of protest is the sum of five hundred and fifty-one pounds five shillings and sixpence sterling, money of Great Britain, hereinabove demanded, and which said amount of interest is the interest hereinabove demanded.

Yet the said defts., although often requested, have not, nor hath either of them, paid to the pltffs. the said sum of money and interest hereinabove demanded, or any part thereof, but to pay the same or any part thereof they the said defts. have constantly refused and still do refuse, to the further damage of the pltffs., of one hundred pounds sterling, money of Great Britain, and therefore they bring suit.

MACFARLAND & ROBERTS, *P. Q.*

W ereupon each of the defendants separately, by his attorneys, filed a general demurrer to the declaration, original and *demanded*, and to each counts thereof; and the plaintiffs, by their attorneys, joined in the said demurrers, and by consent of the parties, by their attorneys, it is ordered that the cause retain its place on the court docket.

310 A transcript from the record.
Teste: RO. HOWARD, *Clerk.*

[Stamp, 5.]

And another paper filed by the plaintiff in this case, on the said 13th of September, 1866, is in these words:

Table of tracts of land for the year 1861, *in Fauquier County, within the district of Silas H. Turner, commissioner of the revenue, with taxes thereon, at forty cents on every hundred dollars value thereof.*

Name of the person who by himself or by his tenant has the freehold in possession of the land charged.	Residence of the owner of the tract of land.	Nature of the owner's estate, whether held in fee or for life.	No. of acres in each tract.	Name of the tract and description of the land, as to water-courses, mountains, or other places on or near which it lies.	Distances and bearing from the ct.-house.	
					Bearing from c. h.	Miles.
James M. Murfee	Fauquier	Fee	250	O. & A. R. R.	E.	2
Elizabeth Fitzgerald	Fauquier	Life	1,289	Rock Hill, Turkey Run	S. E.	6
Rich'd H. Carter	Fauquier	Fee.	424	Near Salem	N. W	14

Total value of land per acre, including buildings.	The sum included in the value of each tract of land on account of buildings.	Total value of the land and buildings.	The amount of tax on the whole tract, at forty cents on every $100 value thereof.	Explanations of alterations during the preceding year, especially from whom transferred, and when, and how the owner derived the land, and why, and upon what authority any alteration was made.	County levy. Amount of levy for county purposes, per centum on State taxes.
25	500	6,250	25 00		
25	8,000	32,225	128 90	313 acres sold to Capt. E. Murray; 968¾ acres sold to Dr. J. H. Murray; 7¼ acres sold to Dennis Cowhig.	
25	500	10,600	52 40		

I, Wm. A. Jennings, clerk of Fauquier County court, in the State of Virginia, do hereby certify that the foregoing is a true extract from the land-book for 1861 of Silas H. Turner, commissioner of the revenue for said county, which said book is on file in the said office.
Teste: WM. A. JENNINGS, *C. C.*

[Stamp, 5.]

And on the 20th of September, 1866, other depositions on behalf of the defendant were received from Commissioner A. D. Payne, in these words:

311 *Deposition of William C. Norris, taken* 10*th August*, 1866, *in Warrenton.*

1st question by defendant's counsel. Are you acquainted with the plaintiff, Gustavus Lersner? And, if so, state when your acquaintance began.

Answer. It began, I think, in 1856, at Linden and Front Royal, Warren County, Va.

2. What was your business at those places, and did it furnish you with opportunities of learning the condition of the plaintiffs?

Answer. I was engaged in the distilling business in Warren County. This business did furnish me with an opportunity of learning the condition of the plaintiff.

3 question by same. What was the plaintiff's pecuniary condition at the time of your first acquaintance, and how was it from that time until the beginning of the war?

Answer. His condition was bad, and continued bad up to December, 1862.

4th question by same. Explain what you mean by bad.

Answer. His credit was not good; he was not thought worthy of credit.

5th question by same. When did you first observe an alteration in his fortunes?

Answer. After I heard of the purchase of several farms. Mr. Bolling's was the first of which I heard.

6. Do you know what was his pursuit previous to the war, and what was his occupation during the first year of the war?

Ans. He was engaged in getting out lumber with a steam saw-mill previous to the war. During the first year of the war he was a purchaser of corn, as agent for the confederate government.

7th. Was he alone in this business, or did he have an associate?

Answer. I think he was alone in this business; the corn was shipped by him on the various roads coming to Massassas. I know this because I copied all the manifests.

8th. Do you or do you not know whether he was at this time in the employ of Major Barbour, A. Q. M. of the Confederate States?

Answer. I think he was; that is my impression at this time. I think I must have known at that time that he was in the employ of Major Barbour; I have no doubt of it.

312 9th. What was Major Barbour's position at the time to which you refer?

Answer. He was quartermaster for General Joseph E. Johnston.

10th. Do you know whether or not Major Barbour was a defaulter in the position to which you have referred?

Answer. I cannot say, not having had the examination of the accounts; but that is the general impression, for a large amount.

11th question by same. Do I understand you to say that the plaintiff up to the beginning of the war was insolvent, and that his change of fortune began with his connection with the confederate quartermaster's department?

(Question excepted to by plff.'s counsel.)

Answer. I considered him insolvent up to the beginning of the war, and he became rich after the commencement of the war.

12th question by same. Had he any other business during the year 1861–'2 than to which you have referred?

Answer. Not that I knew of. I saw him repeatedly at Manassas during the fall and winter of 1861–'2, on business with the railroad company—the Orange and Alexandria—in regard to the transportation of corn and lumber, I think. As well as my recollection serves me, he was in the employ of Major Barbour.

13th. What was and is the business reputation of the pltff.? I mean

to enquire whether or not he was esteemed a speculator and adventurer.

(Question excepted to by plaintiff's counsel as leading question.)

Answer. He was. I do not know whether he is not.

14th question by same. Do you or do you not know whether the pltff. is a foreign or native-born citizen of the United States?

Answer. He is a foreigner.

(By agreement of parties, the plaintiff, by his counsel, excepts to each and every question and answer propopounded to the witness for irrelevancy and for other causes.)

1st question by plaintiff, through counsel. When were you in the distilling business at Linden and Front Royal; that is, from and to what date?

Answer. I think in the years 1857-'8-'9.

2d question by same. What business had you, while in that business, with plaintiff?

Answer. I was in negotiation with him for the purchase of a
313 steam-engine once. I purchased something from him once to be used about the distillery. It was not what I wanted, but I had paid for it. Doct. Fisher, my partner, told me it was not worth while trying to recover it, as he was worth nothing. I have forgotten what the article was—something connected with the machinery *from* my distillery.

3d question by same. After you ceased your distilling business, what matters of business had you with the plaintiff before the war?

Answer. I had no business.

4th question by same. Did you ever make complaint to the pltff. in respect to the article referred to in your answer to my second question, or demand the return of the money; and did you get the article you paid for?

Answer. I did mention it to him. I asked him for the money, and told him the article was not what he represented it to be, and was entirely useless, but did not get the money. I made no further demand upon him in consequence of what Doctor Fisher, my partner, told me. He put me off in some way, but I do not recollect what he said.

5th question by same. How do you know what was the pecuniary condition of the plaintiff from 1856 up to the beginning of the war; from your own knowledge or the statements of others?

Answer. From the statements of others, and from his general reputation.

6th question by same. Can you state from whom you heard said statements?

Answer. Doctor Thos. Fisher, of the upper part of the county of Fauquier, more particularly.

7th question by same. Had Dr. Fisher any connection with the pltff. in business?

Answer. I do not remember whether he had or not. I do not think he had.

8th question by same. You say the pltff.'s condition continued bad until Dec., 1862. How do you fix that point of time as the period at which his condition changed?

Answer. I desire to correct my answer to the deft.'s counsel in question 3. I mean the fall and winter of 1861-'2, which was before the confederate army left Manassas.

9th question by same. Do you not know that the plaintiff bought the

farm of Mr. George W. Bolling prior to his purchase from the defendant?

Answer. I do not know.

314 10th question by same. You speak of the plaintiff as an agent of the confederate government and of Major Barbour. Do you know that he was an agent of the government, or was he not selling corn and other things to the government?

Answer. My idea was that he was acting for Major Barbour.

11th question by same. In answer to the 7th question by deft.'s counsel, you say the plaintiff was alone in the business; the corn was shipped by him, and that you know this because you copied the manifests; were these manifests in the name of the plaintiff?

Answer. I think they were, though they may not have been, but I think they were.

12th question by same. Is Major Barbour living or dead?

Answer. Dead.

13th question by same. Did you ever see his accounts, or any of them, or do you know of your own knowledge that he was, as you have said, a defaulter to the confederate government?

Answer. Oh, no; I do not know. I never saw any of his accounts. In justice to Maj. Barbour, I do not believe he ever intended to defraud the confederate government.

Examination-in-chief resumed:

1st question by deft.'s counsel. In reference to the 11th question of the p*tl*ff., you have stated that the manifests were in the pltff.'s name. Will you state to whom the article or articles therein mentioned were consigned?

Answer. To Major Barbour.

2. What was the generally received opinion of the relation of the plaintiff to Major Barbour? Was there more than an opinion on the subject?

(Excepted to by pltff.'s counsel as a leading question.)

Answer. I do not know that I can answer the question. I have forgotten, if I ever knew. I think he was reputed an agent of Major Barbour. It was not a question of much consequence then, and I never heard it much mooted. I was rather surprised, at the time, at Barbour's employing him in that capacity.

Question by same. In speaking of Maj. Barbour's alleged defalcation, were you speaking from general notoriety or not?

Answer. From general notoriety.

Question by same. Why were you surprised at Maj. Barbour's employing pltff.?

315 (Excepted to by plaintiff's counsel.)

Answer. From his reputation.

Question by same. In what respect?

Answer. He was a stranger and foreigner; and he, Major Barbour, could not have known much about him, or he would not have employed him, because he was looked upon as an adventurer and speculator.

Question by same. State, as fully as you can, the basis of your belief that the plaintiff was insolvent before the war.

Answer. From general report.

(The plaintiff, by his counsel, excepts to the whole deposition so far as the same is based upon hearsay evidence, and because of irrelevancy.)

And further the deponent saith not.

W. C. NORRIS.

The deposition of Granville S. P. Triplett, taken same time and place as the above.

1st question by deft.'s counsel. Are you acquainted with the pltff., (Gustavus Lersner?) And, if so, state when your acquaintance began, and your opportunities of knowing his pecuniary condition at and before the beginning of the late war.

Answer. I think I became acquainted with him in 1859. I had every opportunity of knowing his pecuniary condition. He bought some goods from me for cash. I took it for granted it was all right. I shipped the goods to him at Front Royal, his point of delivery at the time, with the understanding he was to pay me the day after the purchase. For 13 months, sometimes semi-monthly, and invariably monthly, he would say to me, "I am coming in to-morrow to pay this bill." In this way he deceived me for 13 months. I finally warranted him, and made my debt by attaching a water-ram that was at the Adams Express Com. office, on its way to his residence in Warren County. He had been do'ging us continually, and the constable finally caught him at the cars and served the warrant on him. He was insolvent before the war. Col. Jacobs, of Front Royal, had a deed of trust on everything he had. He had nothing but a steam saw-mill and a yoke of oxen, or something of that sort. This condition continued up to the time he was employed by Major Barbour.

2d question by same. What do you know of the employment by Maj. Barbour to which you have referred? What was its nature.

316 Answer. I asked Maj. Barbour, one day, at Manassas, why he had employed so notorious a scoundrel as this fellow, Lersner. His reply was that Lersner had gotten more corn within a short time past than the major portion of the balance of his agents. My impression is—I do not know whether Barbour told me—that he gave him so much per barrel, I think 20 or 25 cents, to furnish a certain number of barrels in a given time. I know it was a large quantity of corn, and that Barbour furnished the means of his purchases.

3d question by same. Had the pltff. any other employment during *year the* 1861-'2 than that to which you have referred?

Answer. Not that I know of. I am under the impression he furnished plank for building hospitals at Manassas. I know that he bought plank in Shenandoah. I heard some of the parties complaining of being swindled by him.

4th question by same. Did his pecuniary condition change after his connection with Major Barbour?

Answer. I do not know anything as a fact.

5th question by same. Do you know whether the plaintiff is a foreigner or native-born citizen?

Answer. I believe he is a foreigner, from his own admissions.

6th question by same. State what have been and are his general pursuits?

Answer. I don't know; he was a sort of a sharper, for whenever he came across a man whom he could take in he took him in.

(The plaintiff, by his counsel, excepts to each and every question and answer because the whole is irrelevant, and specially because a part of it is based upon hearsay and a part speaks of a deed and its contents, which is not produced; subject to these exceptions.)

1st question by plaintiff's counsel. Did you ever have any other transaction of business with the plaintiff than the one spoken of by you in your first answer?

Answer. No, sir.

2d question by same. Do you of your own knowledge know of the transaction of which you speak, with the parties complaining of the plaintiff in Shenandoah County?

Answer. I do not know of my own knowledge, but heard it from the parties who represented they were swindled.

317 3d question by same. You say that he was a sort of a sharper, and when he came across a man he could take in he took him in. Do you of your own knowledge know of any case of that kind?

Answer. I do. He bought my goods for cash and promised the next morning to pay for them. He never did call, and I got the money thirteen or fifteen months after, I do not recollect which, by warranting him and attaching a water-ram of his in the Adams & Co. office. My belief is he never intended to pay me. I have seen him go to the Mansion House, where I boarded, and dine, never register his name, and Green, one of the proprietors, told me he never paid his bill, and said he had done this on one or two occasions.

(Excepted to by plaintiff's counsel as irresponsible, and as hearsay.)

4th question by same. Where did you live at the time this store account was contracted?

Answer. I was associated with Wm. H. Barly, as wholesale *and* hardware merchants, in the town of Alexandria.

5th question by same. What was the amount of that account?

Answer. I think about $28 or $30.

And further this deponent saith not.

G. S. P. TRIPLETT.

Deposition of Benoni Wheat, taken 31st August, 1866.

1st question by defendant, through his counsel. Were you acquainted with the plaintiff, Lersner, before the war?

Answer. I was.

2d by same. Do you know whether or not he was a man of solvency and good credit?

(Excepted to by plaintiff's counsel.)

Answer. He was not in good credit. As to his solvency, I do not know.

3d question by same. Did you ever have any business transactions with him?

Answer. I have.

4th question by same. Was he a man who punctually performed the obligations of his contract?

Answer. I cannot say that he did.

5th question by same. Did you ever refuse him credit on account of want of confidence in his integrity?

318 Answer. I have, rather from his want of ability to pay. I cannot say whether he would pay or not if he had the money.

The whole of the above deposition excepted to by plaintiff's counsel on the ground of irrelevancy and illegality.

And further this deponent saith not.

BENONI WHEAT.

Deposition of Thomas R. Foster, taken same time as the last.

1st question by defendant, through counsel. Did you ever have any business transactions with the plaintiff Lersner?

Answer. I have; that is, Foster & Co., of which firm I was a member.

2d question by same. Was he a man of good credit and solvency?

Answer. He was not so considered when he first came into the country. He was a foreigner, and nothing was known about him. There was a suspicion about him at first.

3d by same. Was he a man of good faith in fulfilling his engagements?

Answer. I do not think he always was.

4th question by same. Where do you reside, and are you acquainted with Ben Lomond and Waterloo, the two tracts of land in controversy; and, if so, what would be their fair market-value in present currency, taking into account the improvements on the two places?

Answer. I reside at The Plains, in Fauquier County, but I am not sufficiently well acquainted with the places to put a value upon them. I have never been on the places since they have been owned by Mr. Bolling. I understand that the improvements are very extensive.

(The first three questions and answers except' as illegal and irrelevant by plaintiff's attorney.)

And further this deponent saith not.

THOS. R. FOSTER.

Deposition of Nathan Loughborough, taken same time as above.

1st question by defendant, through counsel. Where do you reside? What is your occupation? Are you acquainted with the two tracts of land, Ben Lomond and Bollingbrook, now in controversy? If so, what is their value in present currency?

319 Answer. I reside about two miles south of Upperville, Fauquier County, Va. I am a farmer. I am acquainted with the two tracts of land. I think, taking into consideration the quality of the land and improvements upon it, that value of the farms combined would be $75 per acre in specie.

1st question by plaintiff's counsel. What is the value of the land per acre, exclusive of the improvements?

Answer. I think the land is worth $55 or $60 per acre, exclusive of buildings. I mean in specie.

2d question by same. Would it bring that in the market now at public sale?

Answer. I do not know.

3d question by same. Have you known of any land sales lately in the neighborhood; if so, at what price per acre were they sold?

Answer. I have heard of none except the public sale of Oak Hill. I heard that sold at $50 per acre, and that the present tenant had the privilege of cultivating a crop this fall. I do not know whether the $50 was specie or greenback currency.

4th question by same. How does the Oak Hill estate compare in value per acre with Bollingbrook and Ben Lomond?

Answer. I am not sufficiently acquainted with the Oak Hill estate to compare them. I have never gone over the farm; I only know it as I see it from the road.

Question by deft.'s counsel. Was the Oak Hill estate much devastated in the war by the destruction of fences, buildings, &c.; and what is the character of the improvements on the place?

Answer. When I passed by it, some time after the commencement of the war, in 1862, the fencing that had been in sight of the road was

Answer. No, sir.

2d question by same. Do you of your own knowledge know of the transaction of which you speak, with the parties complaining of the plaintiff in Shenandoah County?

Answer. I do not know of my own knowledge, but heard it from the parties who represented they were swindled.

317 3d question by same. You say that he was a sort of a sharper, and when he came across a man he could take in he took him in. Do you of your own knowledge know of any case of that kind?

Answer. I do. He bought my goods for cash and promised the next morning to pay for them. He never did call, and I got the money thirteen or fifteen months after, I do not recollect which, by warranting him and attaching a water-ram of his in the Adams & Co. office. My belief is he never intended to pay me. I have seen him go to the Mansion House, where I boarded, and dine, never register his name, and Green, one of the proprietors, told me he never paid his bill, and said he had done this on one or two occasions.

(Excepted to by plaintiff's counsel as irresponsible, and as hearsay.)

4th question by same. Where did you live at the time this store account was contracted?

Answer. I was associated with Wm. H. Barly, as wholesale *and* hardware merchants, in the town of Alexandria.

5th question by same. What was the amount of that account?

Answer. I think about $28 or $30.

And further this deponent saith not.

G. S. P. TRIPLETT.

Deposition of Benoni Wheat, taken 31st August, 1866.

1st question by defendant, through his counsel. Were you acquainted with the plaintiff, Lersner, before the war?

Answer. I was.

2d by same. Do you know whether or not he was a man of solvency and good credit?

(Excepted to by plaintiff's counsel.)

Answer. He was not in good credit. As to his solvency, I do not know.

3d question by same. Did you ever have any business transactions with him?

Answer. I have.

4th question by same. Was he a man who punctually performed the obligations of his contract?

Answer. I cannot say that he did.

5th question by same. Did you ever refuse him credit on account of want of confidence in his integrity?

318 Answer. I have, rather from his want of ability to pay. I cannot say whether he would pay or not if he had the money.

The whole of the above deposition excepted to by plaintiff's counsel on the ground of irrelevancy and illegality.

And further this deponent saith not.

BENONI WHEAT.

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1st question by defendant, through counsel. Did you ever have any business transactions with the plaintiff Lersner?

Answer. I have; that is, Foster & Co., of which firm I was a member.

2d question by same. Was he a man of good credit and solvency?

Answer. He was not so considered when he first came into the country. He was a foreigner, and nothing was known about him. There was a suspicion about him at first.

3d by same. Was he a man of good faith in fulfilling his engagements?

Answer. I do not think he always was.

4th question by same. Where do you reside, and are you acquainted with Ben Lomond and Waterloo, the two tracts of land in controversy; and, if so, what would be their fair market-value in present currency, taking into account the improvements on the two places?

Answer. I reside at The Plains, in Fauquier County, but I am not sufficiently well acquainted with the places to put a value upon them. I have never been on the places since they have been owned by Mr. Bolling. I understand that the improvements are very extensive.

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THOS. R. FOSTER.

Deposition of Nathan Loughborough, taken same time as above.

1st question by defendant, through counsel. Where do you reside? What is your occupation? Are you acquainted with the two tracts of land, Ben Lomond and Bollingbrook, now in controversy? If so, what is their value in present currency?

319 Answer. I reside about two miles south of Upperville, Fauquier County, Va. I am a farmer. I am acquainted with the two tracts of land. I think, taking into consideration the quality of the land and improvements upon it, that value of the farms combined would be $75 per acre in specie.

1st question by plaintiff's counsel. What is the value of the land per acre, exclusive of the improvements?

Answer. I think the land is worth $55 or $60 per acre, exclusive of buildings. I mean in specie.

2d question by same. Would it bring that in the market now at public sale?

Answer. I do not know.

3d question by same. Have you known of any land sales lately in the neighborhood; if so, at what price per acre were they sold?

Answer. I have heard of none except the public sale of Oak Hill. I heard that sold at $50 per acre, and that the present tenant had the privilege of cultivating a crop this fall. I do not know whether the $50 was specie or greenback currency.

4th question by same. How does the Oak Hill estate compare in value per acre with Bollingbrook and Ben Lomond?

Answer. I am not sufficiently acquainted with the Oak Hill estate to compare them. I have never gone over the farm; I only know it as I see it from the road.

Question by deft.'s counsel. Was the Oak Hill estate much devastated in the war by the destruction of fences, buildings, &c.; and what is the character of the improvements on the place?

Answer. When I passed by it, some time after the commencement of the war, in 1862, the fencing that had been in sight of the road was

entirely gone, so far as I could observe. The buildings seemed to be in a state of dilapidation, particularly the out-buildings. I did not go to the house. The enclosures around it were gone.

By same. What is the character and condition of the buildings, fences, &c., of the Bollingbrooke estate; was the place devastated by the operation of armies?

Answer. The buildings and fencing are in good order and very fine. The buildings are very large and fine and new, being built since 1853.

320 The barn, a very large one, with extensive sheds, is still unfinished; that is, the centre of it. The sheds are completed. The fencing on Bollingbrook is altogether of stone. I recollect but one piece of rail-fence on the place; that is on the western boundary.

By same. What, in your opinion, must such improvements have cost?

Answer. I could not form anything like an accurate opinion. I know that they must have cost a great deal, because they are both extensive and fine. I know of no frame-house on the farm except an old log-house used by Mr. Tidball as an overseer's house.

And further saith not.

N. LOUGHBOROUGH.

Deposition of James F. Jones, taken same time as above.

1st question by the deft.'s counsel. Are you well acquainted with Ben Lomond and Bollingbrooke? and, if so, state what, in your opinion, is their value.

Answer. I am well acquainted with Bollingbrook; Ben Lomond adjoins it; but I have never been on it, and therefore know nothing about it; the value of Bollingbrook alone, with all the improvements, I should put at from $80 to 85 per acre in gold, but the whole estate, including Ben Lomond, from what I have heard of it, I should put at about $75 per acre. Ben Lomond has not the improvements upon it that Bollingbrook has.

By same. Are you acquainted with Oak Hill, an estate recently sold; if so, what did it sell for; what is the present condition of the place with respect to buildings, fences, &c.? Did Oak Hill suffer much by the operations of the war, and to a less or greater extent than Bollingbrook?

Answer. I am well acquainted with Oak Hill; it was more damaged than any estate I know during the war, certainly in our neighborhood; at the expiration of the war there was not a full enclosure on the farm; the land was also much impaired by depredations of hogs; the outbuildings were all destroyed except the barn, which was stripped of the weather-boarding, but the roof left upon; a corn-house and blacksmith shop of little value was left; the dwelling-house was so much impaired as to almost untenantable; the glass all broken and doors smashed; the ice-house, a handsome and ornamented , was unimpaired; the farm sold for $50 a short time back; it sold before the war for $50 in gold.

321 The natural quality of the land I consider equal to Bollingbrook. It does not compare in condition with Bollingbrook. Now, I should make a difference of from 10 to 12 dollars between the two farms, irrespective of the improvements and fencing upon them, owing to their present condition. I am comparing the bare land without regard to improvements, when I speak of the difference in value; the sod and general condition of Bollingbrook warranting such a difference in my opinion of this value. Some of the land of Oak Hill was worked so hard during the war as to be actually in an impoverished condition. I can

only value Mr. Bolling's improvements by what I have heard of the cost of buildings in other places. I do not think there are such outbuildings in this or any of the adjoining counties. The dwelling-house is the largest that I know of in this county. I should judge Mr. Bolling's house cost more than Mr. Henry Dulany's; as it is larger, more costly, and he told me his cost $14,000.

1st question by plaintiff's counsel. What was the price per acre Oak Hill brought at sale lately, and in what currency?

Answer. $50 per acre, and of course Federal currency. I do not think that it sold for near its value.

Question by defendant's counsel. By the terms of sale of Oak Hill, was the purchaser to get immediate possession without any restrictions?

Answer. The crier mentioned, the day of sale, some restrictions. I do not know whether they were incorporated in the decree. The graveyard was reserved. The restrictions, to the best of my knowledge, were that the tenant was to keep possession till the end of the year, and put in a fall crop and reap it.

Question by plaintiff's counsel. How far do you reside from Bollingbrook?

Answer. About six miles, and I am frequently there.

And further saith not.

JAMES F. JONES.

Deposition of Samuel T. Ashby, taken same time as the above.

1st question by defendant's counsel. Do you know the plaintiff Lersner. If so, when did your acquaintance begin? What has been his character for integrity in his business transactions up to the time of the breaking out of the war? Was he a man of solvency and credit?

322 (Excepted to by the plaintiff's counsel as irrelevant and illegal.)

Answer. I have known Mr. Lersner for some years. I did business at Piedmont from '52 to '57, when Mr. L. used to send a great deal of lumber. I have frequently purchased lumber of him myself. Sometimes the measurment of it would be a little short, but whenever I spoke to him about it he always made it good with me. His character for integrity was good. Sometime' he would be a little behind time in sending lumber. After I left Piedmont and went to Alexandria I heard a great deal against Lersner's character, and was directed by Messrs. Barley & Triplett, for whom I was doing business, not to credit him, as they said he had fooled them very badly in some previous business transaction; he was not looked upon as a man of solvency. All this is prior to the war. I met him frequently during the war in Richmond at the hotels; he was well dressed, and seemed to have plenty of money, and had a carriage and couple of horses. I do not know that they belonged to him; they were said to belong to him. I thought he had gotten up in the world very fast to travel in such style.

By same. Have you heard the testimony of the two preceding witnesses; and, if so, have they, in your opinion, overestimated the value of Bollingbrook and Ben Lomond? You will please state where is your residence and occupation; state your own estimate.

Answer. I do not think that they have overestimated the value of the property in its present condition, taking into view the present condition of Bollingbrook and Ben Lomond, with their respective improvements. I live near Markham, in Fauquier County, and have known the estates well for 40 years. I am a farmer by occupation. I consider the whole estate, including the improvements, worth $75 per acre in gold.

(Mr. Bolling, in obedience to call from pltff.'s attorney, has produced a paper marked "A," and herewith returned, which the said Bolling admits to be in his handwriting, and subscribed to by him; and he believes the signature of the attesting witness to be genuine, as well as that of Gustavus Lersner.)

By same. From what you know of the character of the stock on Mr. Bolling's estate, what do you think would be the value of the stock in the memorandum on paper marked "A"?

323 Answer. I think they are worth about $3,355; this estimate is based upon my knowledge of the stock. I have seen them except the hogs.

Question by same. Has the pltff. any association with the people of his neighborhood, or is he isolated?

(Excepted to by plaintiff's counsel as illegal and irrelevant.)

Answer. I do not live in his neighborhood, and do not know.

Question by same. Do you know whether he has offered his present residence for sale?

Answer. I do not know.

1st question by plaintiff's counsel. How far do you reside from Bollingbrook?

Answer. About eight miles.

2d question by same. What do you estimate the value of Bollingbrook per acre, without the buildings?

Answer. I should think it was worth $60 per acre in gold.

3d question by same. Do you think it would bring that now at public sale or private sale?

Answer. I think, if a man had money to invest, it would be a good investment. I do not know whether it would bring it or not; if I had the money I would be willing to give it.

4th question by same. Do you know the Ben Lomond estate; how does it compare per acre with Bollingbrook?

Answer. I know it very well; have known it all my life; the natural quality of the land I consider as good as Bollingbrook; it is rougher, and not so saleable. I should not value it over $35 per acre in gold.

Question by defendant's counsel. Do you know the Elmwood estate, and whether it is now in the possession of the plaintiff, and whether it adjoins the defendant's estate of Bollingbrook?

Answer. I know the estate, and it is separated from Bollingbrook by the county road.

Question by plaintiff's counsel. From whom did he purchase that estate?

Answer. It belonged, at the time of the purchase, to Mr. George Bolling.

324 And further this deponent saith not.

SAM'L T. ASHBY.

Paper marked "A," mentioned in S. T. Ashby's deposition, is in these words:

(A duplicate.)

This memorandum of an agreement entered into this 19th day of January, 1863, between R. B. Bolling and Gustavus Lersner, witnesseth that, for and in consideration of the sum of seventy-seven thousand ($77,000) dollars, to be paid by the said Lersner to the said Bolling, in

the sums and at the times and in the manner hereinafter mentioned, he, the said Bolling, agrees and obliges himself to sell to said Lersner his certain estate known as Bollingbrook, containing, as per deed from Tidball's executors, of record in Fauquier County, seven hundred and sixty-nine acres, (769 acres,) and binds himself, upon the payment of the purchase-money, to convey the same to said Lersner in fee, with or without the consent of Mrs. Bolling, with general warranty. He also agrees to sell one certain other farm, adjoining Bollingbrook, known as Ben Lomond, containing by plat and survey of Mr. Norris (341¼ acres) three hundred and forty-one and a quarter acres, being the same tract purchased of T. N. Latham, commissioner to sell under a decree in the case of Armistead against Armistead, and purchased by said Bolling, a final decree to be yet rendered, and the said Lersner is to be substituted for the said Bolling as the purchaser. Also all the live-stock now on the farms, farming-utensils, and household and kitchen furniture. The silver-plate of all kinds, pictures, prints, statuary, clocks, all severed crops, meats now on hand, fowls, carriages, with their harness, spring-wagon and harness, saddles and bridles, and negroes, are excepted.

The said Lersner agrees and obliges himself to pay to the said Bolling the sum of seventeen ($17,000) thousand dollars on the 1st day of February, 1863; a further sum of ($30,000) thirty thousand dollars on the 1st day of March, 1863, and a like further sum of ($30,000) thirty thousand dollars on the 10th day of March, 1863; making in the aggregate the sum of seventy-seven ($77,000) thousand dollars. By mutual agreement and understanding between the contracting parties, the said Bolling is to use and occupy the above farms and cultivate the same for his benefit and use, without rent or charge; also to use the four mules and ten oxen and ten of the twenty-three milch cows. Should Mr. Lersner
325 desire it, he can, at his discretion, sell thirteen of the cows, and all the calves and swine and sheep. R. B. Bolling agrees and obliges himself to bestow all care on the preservation of the premises and the live-stock *stock*, but is not to be responsible for losses from an invading enemy or any other source. One month after the termination of the war the said Bolling is to give up to Mr. Lersner the premises and live-stock reserved, or sooner, at the sole discretion of the said Bolling. The said Bolling is only to graze and cultivate to an extent equal to the consumption of his family, labourers, and live-stock.

In witness of all the foregoing we, the parties contracting hereunto, have set our hands and seals on the day first above written.

R. B. BOLLING. [SEAL.]
GUSTAVUS LERSNER. [SEAL.]

Witness:
BARTLETT BOLLING.

(Endorsed on the above is) Live-stock: cows, 23; calves, 15; mules, 4; sheep, 81; oxen, 10; hogs, 8; shotes, 43—51. January 19, 1863.

And on the 24th September, 1866, other depositions on behalf of the plaintiff were received from Jas. Keith, com'r, in these words:

Deposition of Robert C. McArtor, taken 8th September, 1866.

1st question by plaintiff's counsel. What is your age, place of residence, and *occupation*?

Answer. I am in my 53d year. I live in Upperville, in the county of Fauquier, and am a farmer.

2d question by same. How long have you resided ther', and to what extent are you acquainted with lands in that vicinity; and do you know especially the two tracts of land called Bollingbrook and Ben Lomond, their situation and value? And, if so, state what is the value of the said tracts of land per acre.

Answer. I have resided in and near Upperville about thirty-five years. I am well acquainted with the lands in that neighborhood, and particularly so with the two tracts mentioned in the above interrogatory.

326 Bolingbroke is about one mile from Upperville; Ben Lomond is further off, say, about three miles from Upperville. I consider Bolingbroke worth fifty-five dollars per acre in greenbacks, and Ben Lomond thirty-five dollars per acre in the same currency.

3d question by same. What is the comparative value of lands in your neighborhood now and before the war?

Answer. I have known of but one sale of lands near Upperville since the war; that farm brought about the same figures in the present currency which it would have sold for before the war in specie. Part of the farm alluded to brought forty dollars per acre; the residue of it less than that sum.

4th question by same. During the war and after your neighborhood was open to the frequent incursions of Federal troops, what was the effect upon the market-value of land in greenback or specie currency as compared with the price before the war; did it rise or fall?

Answer. I know of no sales made in either greenbacks or specie upon which I could have an opinion.

5th question by same. Could lands in that vicinity during the year 1863 have been sold in greenbacks for the price they commanded before the war in specie, looking to the dangers and contingencies of war?

Answer. I don't suppose they could have been sold in 1863 for greenbacks at all, as there was no such currency in circulation at that time, or at least a very insignificant amount of them.

6th qu'stion by same. Are there any lands offered for sale in your neighborhood at present; if so, in what currency and at what prices, compared with the prices asked for the same lands before the war?

Answer. I am not prepared to answer, as I know of but two farms in the market at present, and am not informed as to the terms upon which they are offered for sale.

7th question. Do you know what Mr. Bolling gave per acre for the farms known as Bolingbroke and Ben Lomond?

Answer. I am informed that he gave about forty-two dollars per acre for Bolingbroke, and I know that he paid thirty-five dollars per acre for Ben Lomond.

8th question by same. Was there much destruction of property by the Yankee forces during the war, and what effect had this state of things upon the sale of lands and their price in gold, or the gold standard?

Answer. There was very considerable destruction of property, barns,

327 houses, fences, farming-implements, crops, &c., the effect of which was such that if lands could have been sold for gold at all it would have been at greatly reduced prices.

1st. question by counsel for defendant. Was it not a mountain farm which you mentioned as having been sold for forty dollars per acre?

Answer. I said that part of the farm to which I referred sold for forty dollars per acre; that part I consider good land, the remainder of the farm is mountainous, and brought only ten dollars per acre.

2d question by same. In what year did Mr. Bolling buy Bolingbroke and Ben Lomond?

Answer. I cannot say positively; I think about the 1853 he bought Bollingbroke, and Ben Lomond about the year 1859.

3d question by same. Are not the buildings and improvements at Bolingbroke equal or superior to any in this part of the country, and were they not made by Mr. Bolling since his purchase of the place?

Answer. The buildings on Bolingbroke are very fine; that is the house. I have only seen the out-buildings at a distance. The greater part of the house, as it at present stands, was built by Mr. Bolling, as was also a large barn, which I have never been close to. There where good improvements on the place at the time Mr. Bolling bought it.

Re-examined by plaintiff's counsel:

1st question. Were the improvements on Bolingbroke, at the time of Mr. Bolling's purchase of it, sufficient for effective farming and comfortable residence, and are the improvements put upon the place by Mr. Bolling useful in proportion to their cost?

Answer. I considered them perfectly sufficient at the time of his purchase. I do not think the improvements made by Mr. Bolling by any means useful in proportion to their cost.

2d question by same. Are there any improvements on Ben Lomond?

Answer. It has been two years since I was at Ben Lomond; there were at that time a tolerably good barn and stable.

3d question by same. Is the land on Bolingbroke and Ben Lomond esteemed first class in your neighborhood?

Answer. There is some as good land on Bolingbroke as any; but, taken as a whole, I do not consider it first-class land. I regard Ben Lomond as inferior to Bolingbroke.

328 And further this deponent saith not.

R. C. McARTOR.

Deposition of George S. Ayre, taken same time as the above.

1st question propound*i*d to Mr. McArtor by plaintiff's counsel.

Answer by Mr. Ayre. I am forty-nine years of age. I reside one mile north of Upperville, in the county of Loudo'n, and am by occupation a farmer.

2d question propounded to Mr. McArtor by plaintiff's counsel.

Answer by Mr. Ayre. I have lived there twenty years, and am well acquainted with lands in that neighborhood. I know especially the lands called Bolingbroke and Ben Lomond, and concur with Mr. McArtor in his estimate of their value.

3d question propounded to Mr. McArtor by plaintiff's counsel.

Answer by Mr. Ayre. I do not think land will bring any more now in the present currency than they would have brought before the war in specie.

4th question propounded to Mr. McArtor by plaintiff's counsel.

Answer by Mr. Ayre. I heard of no sales during the war of lands for either gold or greenbacks. The prices of land for gold or greenbacks declined very much, and I don't think a sale could have been effected for either.

5th question propounded to Mr. McArtor by same.

Answer by Mr. Ayre. I think not.

6th question propounded to Mr. McArtor by same.

Answer by Mr. Ayre. I know of but one farm offered for sale in my neighborhood; that belongs to Mayland Gibson's estate. I went with a gentleman who proposed to purchase. The admr. asked him forty dol-

lars per acre for it in currency. The same farm has been offered for sale at public auction since the war, but there were no bids made for it. The owners of it were offered forty dollars for it before the war. The gentleman with whom I went to look at the farm declined to buy at forty dollars per acre. The farm belongs to Gibson's estate, has upon it a good dwelling-house and barn. The fences upon the farm were somewhat dilapidated, but none of the timber had been destroyed during the war. I consider the Gibson land better than the Ben Lomond farm, but inferior to Bolingbroke.

8th question propounded to Mr. McArtor by same.

329 Answer by Mr. Ayre. There was considerable destruction of property in my neighborhood during the war, including barns, fences, crops, &c. Prices were very much effected by it. I do not think any sales of land could have been made for gold or according to the gold standard.

8th question propounded to Mr. Ayre by counsel for plaintiff. What effect had the destruction of the M. G. R. R. upon the prices of land in your neighborhood?

Answer by Mr. Ayre. I don't know that it has had much effect, as we have had nothing to transport upon it, and as we look forward to its speedy reconstruction.

9th question by same. Who owned Bolingbroke before Mr. Bolling purchased it, and was the former owner a large and successful farmer and grazier, and were the improvement' sufficient for effective farming?

Answer. Mr. Josiah Tidball owned it. He was considered a successful grazier, but did not farm upon a large scale. I considered the improvements sufficient.

10th question by same. Were the improvements put the place by Mr. Bolling useful in proportion to their cost?

Answer. I hardly think they were. The barn is still in an unfinished state.

Cross-examined by counsel for defendant.

1st question by defendant's counsel. Did not the barn at Bolingbroke cost more than all the houses upon Gibson's place?

Answer. The barn is unfinished at present; if completed, it would probably cost about as much as all the houses on Gibson's farm put together—the cost of labor and material being much greater now than formerly.

2d question by same. Is not the barn sufficienty completed to be of use?

Answer. Portions of the barn may be useful at present, but the central part is without a roof.

3d question by same. Was it not in November, 1864, that the destruction of fences, &c., was commenced under General Sheridan's orders, of which you spoke in your examination-in-chief, in reply to 8' question propounded by plaintiff's counsel?

Answer. The destruction of barns and mills was chiefly done in November and December, 1864; but the taking of stock and destruction of crops commenced when the Yankees first occupied my neighborhood, in March, 1862.

330 4th question by same. Did the people in your neighborhood, except those who were in the army, remain at home during the war?

Answer. They remained at home in one sense of the word, but they did a considerable amount of dodging.

5th question by same. Did not Mr. Bolling remain *ta* home during the war?

Answer. I believe he generally remained at Bolingbroke; he sometimes went South and sometimes North, but was usually at home.

6th question by same. Did you purchase any land during the war for confederate money?

Answer. I purchased two farms for confederate money.

7th question by same. Have you had or do you anticipate any controversies arising out of said purchases?

Answer. As to one of the purchases, I have had no controversy; I am in possession of it and expect no difficulty. I bought it in the early part of 1863, and gave 15 dollars per acre for it, which is less than it would have brought before the war. I bought the other farm in the fall of 1863; I gave, I think, about 51 or 52 dollars per acre for it. I refer to Llangholand farm; it consists of about 786 acres. I paid for it $21,800 confederate money, and ante-war lien upon the land of $19,020 was discharged by me. There has been a controversy as to the last purchase, but that is now concluded. There was never any controversy between myself and my vendor.

Re-examined by counsel for plaintiff:

1st. question. Since the loss of slaves is there not a great excess of building accommodation on Bolingbroke?

Answer. I think so.

2d question by same. What would it cost to complete the barn?

Answer. I am unable to say; a good deal I should think, owing to its unfinished state, to which I referred in a former answer.

3d question by same. Is the plan of the barn and other outbuildings in accordance with the opinions of practical farmers in the neighborhood; are they not more ornate and expensive than necessary?

Answer. They are more expensive and extensive than we consider necessary, or than any in our neighborhood. His plan of out-
331 buildings differs from the one usual in our neighborhood, but I can't say where he got the idea from.

Cross-examined by counsel for defendant:

1st question. Is there not an increased demand for houses in your neighborhood?

Answer. There is demand for houses by contrabands, but it is not every one who is willing to have them as tenants.

2d question by same. Am I understand you, in estimating the value of improvements, as attaching no value to what is only ornamental?

Answer. Certainly not. The man who can afford the ornamentals is entitled to them, but I do not give the ornamental the preference over the useful and necessary.

3d question. In estimating the value of property, am I to understand that you would look only to the useful?

Answer. That would depend, the condition of my finances in the sale of property; the purely ornamental rarely brings its original cost. In estimating the value of Bolingbroke I look only to such improvements as are necessary to its comfortable enjoyment. I would rather have half the outbuildings upon Bolingbroke than the whole of them, as to keep in repair the excess of what would be really useful would be an unnecessary expense. And further this deponent saith not.

GEO. S. AYRE.

Deposition of A. C. Byrne, taken same time as the above.

1st question propounded to Mr. McArtor by plaintiff's counsel.

Answer by Mr. Byrne. I am thirty-four years of age; I reside about two miles west of Upperville, near the Fauquier and Loudoun line, where K. G. Hicks formerly lived; and my occupation is that of a farmer.

2d question propounded to Mr. McArtor by same.

Answer by Mr. Byrne. I have lived in the neighborhood of Upperville for ten years; I am very well acquainted with lands in that vicinity, and know both Bolingbroke and Ben Lomond, and consider Bolingbroke worth sixty dollars per acre, and if I had the money would be willing to pay that price for it in greenbacks. I would be unwilling, under any circumstances, to give more than thirty dollars per acre for Ben Lomond in the same currency.

332 Question by plaintiff's counsel. Have you had occasion recently to notice the fencing upon these two farms?

Answer. The outside fencing upon the east and north sides of Bolingbroke is in excellent condition, and is of stone; upon the west side the fencing is in bad order; it is chiefly rail fence, and the greater part in very dilapidated condition; the south side I have not seen at all. The cross-fences are all out of repair; a good part of cross-fencing is made of rails; nearly all the fencing upon Ben Lomond is of rails and is a bad condition, most of the rails being decayed.

Cross-examined by counsel for defendant:

1st question. How does the fencing upon these two farms compare the enclosures upon other farms in that vicinity?

Answer. The fencing generally is in bad condition; I do not know that it is worse upon the two farms referred to than upon other places.

2d question. Taking into consideration the quality of the land, its location and improvements, do you know so desirable a farm in Fauquier as Bolingbroke?

Answer. That is the best farm in that section; the land upon Goose Creek I consider better; all things considered, however, I prefer it to any I know, except Glascock's and Fletcher's farms, which are partly in Fauquier and partly in Loudoun.

Question by plaintiff's counsel. Is the land on Bolingbroke first-class as compared with other lands in that vicinity?

Answer. Compared with the Goose Creek lands, I regard it as second class. And further this deponent saith not.

A. C. BYRNE.

And on the 23d of January, 1867, other depositions on behalf of the defendant were received under cover, sealed, in these words:

The depositions of Richard Welby Carter and H. G. Dulany, taken the 15th January, 1867.

RICHD. WELBY CARTER'S DEPOSITION:

1st question. Are you acquainted with the subject-matter of controversy between Gustavus Lersner and Robt. B. Bolling? If so, state what, in your opinion, w'd be the fair market-value thereof?

333 Answer. I think seventy-five dollars an acre is the value of the farm known as Bollingbrook, (in gold;) Ben Lomond is also valued at the same price—taken as a part of Bollingbrook.

2d question by same. Has this estate been much injured by the ravages of war; and what was its value before the war?

Answer. I have been on the aforesaid place since the war; I think the whole farm is in very good order, and think the farm was worth seventy-five dollars in gold before the war.

And further this deponent saith not.

RICHD. WELBY CARTER.

RICHARD H. DULANY.

1st question by defendant. Where do you reside? Are you a land-owner? Are you acquainted with the subject-matter of controversy between Gustavus Lersner and Robt. B. Bolling? And, if so, what, in your opinion, is the fair market-value thereof now, and what before the war? Has the estate suffered much by the war?

Answer. I reside near Upperville, in Fauquier County, Va. I am a land-owner. I am acquainted with the subject-matter of controversy between G. Lersner and R. B. Bolling. I believe the fair market-value of the estate Bollingbrook and Ben Lomond to be seventy-five dollars ($75.00) in gold per acre at the present time. I do not think the estate has suffered much by the late war.

And further saith not.

H. G. DULANY.

Endorsed on the foregoing depositions is the following:

The within depositions were excepted to by Mr. Robt. Bently, as agent for Mr. Gustavus Lersner, on account of the illegality of the notice as to time, (before they were taken.)

JOHN CARR, *J. P.*

And on the 27th of February, 1867, other depositions on behalf of the defendant were recd. from Comr. James Keith, in these words:

Deposition of R. H. Carter, taken 26th February, 1866.

334 1st question by John S. Mosby, counsel for defendant. Are you acquainted with the subject-matter of controversy between the plaintiff, Lersner, and the defendant, Bolling? If so, what is the value thereof?

Answer. I am, and consider the said estate well worth seventy-five dollars per acre.

Cross-examination by plaintiff:

1st question. Do you know how much land is in the two tracts, respectively, and do you value the whole at $75 per acre, or the Bollingbrook estate?

Answer. I think the Waterloo tract contains about seven hundred and fifty acres, and the Ben Lomond tract about 350 acres; the former, I think, worth from 5 to 10 dolls. per acre more than the latter.

2d question. Do you make your estimate in greenbacks or in gold?

Answer. I think the whole estate worth $75 in gold, and regarded it worth that before the war.

3d question. Do you think the whole tract would now sell at public sale for that price?

Answer. I think it would, or nearly so, judging from sales that I have heard of having recently been made in this and other counties.

4th question. How far do you reside from Bollingbrook?

Answer. About six miles.

5th question. How much did Mr. Bolling pay for the two tracts?

Answer. I do not know.

6th question. During the war how did lands sell relatively to their gold-value before the war, in upper Fauquier?

Answer. I have no knowledge of any sales *have being* made during the war in upper Fauquier, except one made by W. B. Ross of a tract near Salem, for $200 per acre, in confed. money. That was made in 1864; I think in December.

7th question. Did lands in Virginia elsewhere, and in Fauquier, as far as you know, command in confederate money their ante-war value according to their gold standard?

Answer. I know nothing of sales made elsewhere in Virginia. The sale referred to in last answer as made near Salem, in 1864, certainly did not command its ante-war value.

8th question. What was its ante-war gold-value; what its present value in greenbacks?

Answer. I think its present currency-value is about $25
335 per acre. It would probably have sold for 20 or $25 prior to the war.

And further saith not.

RICHD. H. CARTER.

Deposition of Joseph H. Blackwell, taken same time with foregoing.

1st question by counsel for defendant. 1st question is repeated to you that was asked Major Carter.

Answer. I am, and think the whole estate worth seventy-five dollars per acre in gold.

Cross-examination by plaintiff's counsel:

1st question. Do you think it would sell for that now at public sale?

Answer. I think the Waterloo tract would, and the whole would before the war, with its present buildings upon it.

2d question. How far do you live from Bollingbrook?

Answer. About three and a half miles.

3d question. Did you know of any sales of land in Fauquier during the war? If so, did they bring their ante-war gold-value, either in gold or equivalent currency?

Answer. I have no recollection of any.

4th question. How much of the value you attribute to the land is due to the improvements in buildings made by Mr. Bolling since his purchase?

Answer. About twenty-five dollars per acre.

And further saith not.

J. H. BLACKWELL.

Deposition of Addison B. Carter, taken 26th February, 1867.

1st. question. How far do you live from Bolingbroke? What is its value? What was the value of the personal property included in the sale of the Bollingbrooke estate?

Answer. I live between six *or* seven miles from Bollingbrook. I consider the estate worth sixty-five or seventy dollars per acre. The household and kitchen furniture was valued by Messrs. Loughborough, Lewis

Marshall, Walker Armistead, and myself at between twenty-five hundred and three thousand dollars.

Cross-examination by plaintiff's counsel:

336 1st question. Do you value the Ben Lomond estate at $65 or $70 per acre?

Answer. I do not. I value Bollingbrook proper at that, on account of the improvements and the superior quality of the land.

2nd question. What value do you put on Ben Lomond?

Answer. Really, I can hardly say. I have seen but very little of it, have been on the place only once since the death of Gen. Armistead, and that was a month or two ago. I should say, in its present condition, I would not estimate it over $35 or $40 per acre.

3d question. Is your estimate in the greenback currency?

Answer. Yes, of Ben Lomond. I always considered the Bollingbrooke place worth my estimate in gold.

4th question. Is that your estimate of its ante-war value, or of what it would now bring if offered for sale?

Answer. I cannot say what it would bring now. I should say its ante-war value was what I have stated. I can't say what it would bring if put up to the highest bidder. I don't consider it worth less than it was before the war, but can't say what it would bring if put up under the pressure of the times and the existing circumstances.

5th question. Is your estimate of the personalty made in greenback currency?

Answer. Yes; that is the way I understood it.

6th question. Did land in your neighborhood during the war hold its ante-war gold-value?

Answer. I can't answer that question. There was no test of it that I know of. A farm sold the other day, the Trap farm, for $50, in my neighborhood; that was its ante-war value, I think. I presume it was sold in the currency of the day, called greenbacks.

7th question. How came you to make the valuation of the personalty spoken of?

Answer. I was at Mr. Bolling's to dine with him with other gentlemen, and was called on by him to estimate it.

8th question. Do you know what property was included in the sale to Lersner?

Answer. I do not, only hearsay from Mr. Bolling and others.

9th question. Did you hear of the sale of the land by Mr. Bolling to Lersner about the time it was made?

Answer. Not for two or three months after, except from rumor.

10th question. From whom did you hear of it then?

337 Answer. From Mr. Bolling himself.

11th question. Was he not, at that time, well pleased with the sale?

Answer. I can't say. He merely told me he had sold it. I have forgotten whether he told me the terms.

12th question. Has he ever since the sale continued in possession of the estate?

Answer. I think he has.

13th question. What would be a fair annual rent for the whole place?

Answer. I cannot say.

And further this deponent saith not.

A. B. CARTER.

Deposition of Nathan Loughborough, taken same time with the above.

1st question by counsel for defendant. Same as 1st question propounded to A. B. Carter.

Answer. In a former deposition I have given my estimate of the value of the land. I live about two miles from Bollingbrook. I do not know the value of the stock upon the farm. I was requested by Mr. Bolling to value the household and kitchen furniture, and estimated it at between 2,500 and 3,000 dollars, probably near' the latter than the former sum.

Cross-examined by counsel for plaintiff.

1st question. Did you know of the sale by Bolling to Lersner about the time it was made, and did you know of it from Bolling?

Answer. I heard of it from rumor a long time before I heard it from Bolling?

2d question. When did you hear of it from Bolling?

Answer. Some six or seven months after I heard of it from rumor.

3d question. When you heard of it from him did he not express himself satisfied and well pleased with the contract?

Answer. He did not say anything about that; he told me the fact of the sale.

4th question. What would be a fair annual rent for the whole estate, Bollingbrook and Ben Lomond?

Answer. I could not say.

And further saith not.

N. LOUGHBOROUGH.

338 And on the 4th of March, 1867, other depositions on behalf of the plaintiff were received and filed in this cause in these words:

Deposition of John A. Carter, taken 1st March, 1867.

1st question by plaintiff's counsel. State your age, place of residence, and whether you know the estates called Bollingbrook and Ben. Lomond; how far you live from them; also your occupation and how long you have pursued it, and what, in your opinion, is the present value of these estates?

Answer. I am fifty-eight years of age last November. I live in Loudoun County, five miles from Upperville and about seven miles from Bollingbrook. I am a farmer, and have been such for thirty years and more. I know the estates mentioned well, and have known them for more than forty years. I should consider $70 per acre a fair sale of Bollingbrook proper, where a man wanted to sell and another wanted to buy. I throw out of view any liability to confiscation, &c. I estimate that value in greenback currency, as I don't consider gold a currency at all now. I could not put Ben. Lomond at more than $30 per acre in the same currency.

2d question by same. During the war, say in January, 1863, looking to the liability of lands in this country to the ravage of war, what estimate in gold currency would you put upon the said estates?

Answer. I don't think there would have been any fair sale for land at that time in gold, and I don't believe you could have sold Bollingbrook for $35 in gold; there was no sale for gold at all. This was owing to the unsettled state of the country and the difficulty of getting gold. I don't believe you could have sold any land for gold or for anything except in confederate money. I never heard of any sale for gold. This is

conjecture, for as there were no sales I have no standard by which to make an estimate. Upon thinking of it, I prefer to put the estimate at $30 instead of $35, supposing the land had to be sold for gold. As to Ben Lomond I don't believe you could have sold it for $10 per acre, certainly not more than $12.50. There are no improvements on it and very much out of order.

3d question by same. Considering all the circumstances of the times, the dangers and ravages of the war, what do you think of the sale of the two tracts in January, 1863, for $77,000 in confederate currency?

339 Answer. Taking confederate currency at three for one in gold, I would estimate Bollingbrook at $90 per acre in confederate money, and Ben. Lomond at $36 in confederate money per acre.

Cross-examined by the defendant's counsel:

Question 1st. Have you seen the estate referred to within your answers in the last seven years, and did you examine the character of improvements put upon it by Mr. Bolling.

Answer. I have seen it more or less every year. I have been in the house frequently, and have seen most of the lower portion of the house; and have a general idea of the improvements. I saw the barn as it was being built.

2d question by same. Was there any gold in circulation during the year of 1863, in the vicinity of Upperville?

Answer. None that I know of.

3d question by same. Was confederate money at any time and at any price convertible into gold in the section referred to in 1863?

Answer. None that I know of.

4th question. Was not the Federal Army at the time referred to lying between this section and Richmond?

Answer. They were lying at Fredericksburg, and I believe held the Rappahannock to Warrenton.

5th question by same. In estimating the value of Bollingbrook and Ben Lomond in gold, are you not influenced in some degree by its peculiar scarcity in this section and its partial separation from the confederate capital?

Answer. I do think that the scarcity of gold, the liability of raids of the enemy, and the general uncertainty of property, all had considerable effect in the value of the property.

Question by same. Of all property was not land esteemed the most valuable, relatively; were not the people especially indisposed to part with their lands for confederate money?

Answer. I think land was considered more valuable relatively than personal property, and I know of but four sales in this neighborhood, Langollen, Bolingbrook, a sale made by Mr. Carr and by a Mr. Smith.

Question by same. What would you have taken at the time referred to for your estate in confederate money?

Answer. I would not have sold it; I never would have sold it
340 as an investment for confederate bonds. If I valued my farm at $50, I would have taken its ratio in confederate money.

Question by same. Would you have been willing to take Richmond rates of gold and confederate money, considering the distance from your estate and the occupancy of the county by the enemy?

Answer. I think I would in 1863. I think there was passing between the places at that time. I desire to explain my answer to previous question. At time referred to (1863) I would have taken $25 in gold for my farm, or its equivalent in confederate currency.

Question by same. If you had sold your farm at what you esteem its intrinsic value, would you have considered yourself paid by receiving an equal number of confederate dollars?

Answer. Certainly not.

Examination-in-chief resumed:

1st question by plaintiff's counsel. Did you value your estate in gold in January, 1863, at the same price you did before the war, or do you now hold it at its gold-price before the war?

Answer. In answer to the first branch of the question, I say I did not; and as to the last branch, I say I would take, I think, in greenbacks what I held it at in gold before the war.

2d question by same. Was there not a great destruction of buildings in this section by the enemy during the war?

Answer. Yes, sir; barns and mills particularly. I do not recollect of any dwelling-houses destroyed.

3d question by same. What did you hold your estate at before the war?

Answer. $45 per acre.

And further saith not.

JOHN A. CARTER.

Deposition of Robert Carter, taken same time as the foregoing.

1st question propounded to J. A. Carter.

Answer. I am forty-nine years old. I reside two miles from Upperville, about four miles from Bollingbrook. I am a farmer, and have been farming since 1839. I know the estates in question. I used to know them, and have known them all my life. If I had the money
341 to buy a farm, and wanted one, I would give $60 in greenbacks for Bollingbrook, and no more. I don't know that I would like to invest in Ben Lomond, but think it ought to be worth $30 per acre in greenbacks.

2d question propounded to J. A. Carter.

Answer. I never thought anything about gold currency at that time—never saw any. I was not in this country at that time. I have no idea what property would then have brought in gold, and know of no sales in gold, and have no standard by which to estimate property.

3d question propounded to J. A. Carter.

Answer. I never thought of it at all; it made no impression on me any way. Thinking of it now, with the lights now before me, and as it has turned out, I think it was a pretty bad business.

4th question by same. Do lands in this country hold their gold-value prior to the war?

Answer. No, they do not. I find people willing, and should be myself, to take the price in greenbacks which I would have taken in gold before the war; no one talks of gold, and estimates of value of everything is in the greenback currency. Before the war it was in gold.

5th question by same. Are you a land-owner?

Answer. I do own an interest in lands held by my mother as dower for her life.

6th question by same. Did lands with improvements upon them command, during the war, their ante-war price, looking to the danger of ravages by the enemy?

Answer. I can't tell. I know of no sales, and therefore cannot tell.

7th question by same. Would these estates have commanded a sale at the price you now estimate, say in January, 1863?

Answer. No, not under the circumstances; I don't think they would, the war on hand, &c. I know I would not have given it for them.

Cross-examined by defendant's counsel:

1st question. As you were continually absent during the war in the confederate army, are not all of your estimates more or less conjectural?

Answer. Well, yes. I have little or nothing to base my opinion upon. I generally estimate values by comparison. There are no sales at
342 present upon which I can base an estimate. I do not know that Bollingbrook, if put up for sale, would bring $60 now; I don't think it would if put up at public auction.

Question by same. Is not the value which you put upon greenbacks, and consequently the value of land when measured by it, chiefly based upon its capacity to pay debts, rather than its general worth as a measure of value?

Answer. That is the only value I put upon any money—to pay my debts and buy what I want with it.

And further saith not.

ROBT. CARTER.

Deposition of John Carr, taken same time with the foregoing.

1st question propounded to J. A. Carter.

Answer. I am fifty-two years old. I reside about a mile from Bollingbrook. I own land adjoining Ben Lomond. I am a farmer, and have been for 28 years. I have known the two estates ever since I was a boy. I know them as well as I can know any land. I estimate Bollingbrook at $60 per acre; it is high at that. I make my estimate in greenback currency. I estimate Ben Lomond at $28 in greenbacks. I bid $28 for it before the war, and think it is worth no more in the present currency.

2d question by same. What was the value of land in this neighborhood in January, 1863, in gold, or in any other currency, and did you know of any sales during the war?

Answer. I don't know. There was no sales of the sort, no propositions to buy in gold, that I heard of. I sold a place during the war, in 1863. About the latter part of 1862, or early part of 1863, I sold 300 acres adjoining Ben Lomond, and I thought better land, for $43 per acre in confederate money. I sold 80 acres afterwards—six months afterwards perhaps—for $140 per acre, adjoining my home-place, no improvements on it, to Henry Simpers. I think that was in fall 1863, or it may have been in 1864. I cannot fix the date.

3d question by same. Did lands in this section hold their ante-war price in gold during the war?

Answer. I should think not.

4th question by same. Why not?

Answer. There was the danger of depredations from the war, and no gold to buy with, and the uncertainty of the times.

343 5th question by same. Was there much destruction of buildings in this section by the enemy?

Answer. Yes, there was—barns, corn-houses, stables, and mills; no destruction of dwelling-houses in this neighborhood.

6th question by same. How as to horses, cattle, and other stock?

Answer. They horses were generally taken, and some cattle taken in my neighborhood.

7th question by same. Was there much apprehension among the people of the destruction of such buildings and carrying off of stock by the enemy during the war?

Answer. Very great. There could not have been greater. We were disappointed if we suffered no loss.

Cross-examination by defendant's counsel:

Question. When did the burning to which you have referred take place? Was there any burning previous to the battle of Chancellorsville?

Answer. In the fall of 1864. There was none previous to the battle referred to that I know of.

2d question by same. Was any depredation upon the stock or crops of this section previous to the spring of 1863?

Answer. I think there was by Geary in 1862. I know it.

3d question by same. Had the apprehensions to which you have referred affected the value of real estate before spring of 1863?

Answer. I should think they had. I base my opinions on depredations upon crops and stock and the uncertainty of securing crops.

4th question by same. What price do you put upon your own land, contiguous to Ben Lomond?

Answer. My land is not for sale. I have not priced it.

5th question. Have not you and Mr. Bolling had an affray, and are not your feelings still unfriendly?

Answer. Yes, sir. I don't think my feelings are friendly. I have nothing against him, but he does not choose to have anything to do with me.

6th question by same. Can you fix the time of your first sale of land? Was it before or after the battle of Fredericksburg?

344 Answer. I don't know the date of either. To the best of my recollection, it was early in the winter of 1863.

Question by same. Did the land which you speak of selling in 1862 or 1863—I mean the land joining Ben Lomond—have any improvements upon it?

Answer. It had a good country farm-house, stable, and granary, and was fenced with stone almost entirely.

Examination-in-chief resumed:

1st question. Do you know of any recent sales in this neighborhood, and how did the prices compare with the prices before the war?

Answer. The sale of Mr. Settle's land, the sale of the Trap land, belonging to Littleton's heirs, and "Newstead," the land of Grayson's heirs. Settle's land was not sold for money. He took cattle for the land. He lost on them very considerably, but expected to do so to some extent. He sold the home place at $40 per acre in greenbacks. It was worth perhaps $45 before the war. I think he would have done well at $40 if he had gotten the money and had lost on the cattle. Before the war the Grayson land was worth, with the improvements, as a small place, $50 per acre. It sold for $45 per acre in greenbacks. The Trap tract before the war ought to have brought $60. It sold for $50 in greenbacks.

Question by defendant's counsel. Was not Settle in debt to his purchasers, and was not that the chief inducement to the sale.

Answer. If he was I do not know.

2d question. Do you consider the Settle farm a better farm than the Hartman farm?

Answer. I do; I mean the house farm. It was always so considered. I consider it at least ten dollars better.

Question. Were not the Trap and Newstead farms sold rather because the estates were in debt, or to divide amongst heirs?

Answer. The Trap was sold to divide, the other to pay some debts and divide; I suppose so. And further saith not.

JOHN CARR.

Deposition of Daniel S. Kerfoot, taken same time as the foregoing.

1st question propounded to J. A. Carter.

345 Answer. I am about 65 years of age. I live on a farm, which I own, adjoining both Bollingbrook and Ben Lomond. I am a farmer, and have been so for fifty years. I will estimate it in this way: When Mr. Bolling bought Bollingbrook (then called Waterloo) I was a bidder for a part of it which adjoins me. I bid $50 per acre for 130 or 140 acres, which I thought the best part of the farm. The farm was sold in separate parcels, I think. With the improvements, I think Bollingbrook would bring $60 per acre, and it is strong at that, I think. I mean in greenback currency. As to Ben Lomond, my opinion is that $30 in same currency would be a strong price for it.

2d question by same. Do you think land would now command its ante-war price in gold?

Answer. I think not.

3d question by same. Was there much depredation during the war in this neighborhood by the enemy?

Answer. A good deal; cattle, horses, sheep, and everything eatable. There were two mills burned in my neighborhood. No barns were burned around me that I know of. I calculated every moment in 1864 that they would come by me and destroy my barns, &c., but I fortunately escaped. I do now remember that Joshua Fletcher, sr., had his barn or stabling burned—and his place adjoins mine, or one of my farms.

4th question by same. Was there much apprehension in this section of the destruction of stock and of buildings on farms by the enemy during the war?

Answer. There was a good deal. At the time that General Geary (now I believe governor of Pennsylvania) was in this section in the spring of 1862, he took horses, cattle, &c., off. The people feared they would be broken up if he remained much longer.

5th question by same. Have you known of any sales of lands recently in this section?

Answer. I do not.

Cross-examination by defendant's counsel:

1st question. Do you know of any individual not in debt, and with land sufficient for his farming operations, who will take in greenbacks what he asked before the war for his farm?

Answer. No, sir; I do not.

2nd question by same. You have spoken of the apprehensions
346 which were created by Geary's marauding; will you say sions and inspired the people with a hope and belief that they were no longer to be affected by marauding?

Answer. I don't know; I can't recollect.

3rd question by same. When did the burnings you have referred to occur?

Answer. In 1864.

And further saith not.

DANIEL S. KERFOOT.

Deposition of John T. Ross, taken same time as the foregoing.

1st question to J. A. Carter.

Answer. I am 43 years old; I reside four miles from Upperville, about six miles from Bollingbrook. I am a farmer, and have been for twenty years. I know the farms mentioned, and have done so for ten or fifteen years. I estimate the value of Bollingbrook at $60 in greenbacks per acre. I estimate Ben Lomond at $30 per acre in same currency.

2d question. Did lands during the war in this region hold their ante-war price, and especially did they command the value of the improvements in buildings upon them? State your reasons.

Answer. I think not, nor would the improvements have commanded their value. They were not highly valued during the war. My reasons are that buildings were very uncertain property, because we were expecting to lose them by the depredations of the enemy.

3rd question by same. Was the destruction and menace of destruction great during the war to buildings, stock, &c.?

Answer. The destruction was great, and the threats were more general than the actual destruction. There was very little property in stock left in my neighborhood. The destruction of barns was very general; this was in November, 1864. There were no dwelling-houses destroyed at that time in this neighborhood, that I remember.

Cross-examined by defendant's counsel:

1st question. Were the apprehensions of which you have spoken continuous, and were there not periods when the people felt relieved of them and hopeful of security?

Answer. There were periods when we felt a little more secure.

347 2d question by same. Was not the period following the victory of Fredericksburg one of those times of confidence and hope?

Answer. I do not recollect, but I suppose it did. It was considered a great thing.

3rd question by same. Do you know whether individuals free of debt and under no other necessity to sell, rate their lands now in greenbacks as they did before the war in gold?

Answer. I do not know much about that. Such people are not disposed to sell, and such lands are not priced.

And further saith not.

JOHN T. ROSS.

Deposition of Thomas Glascock, taken 2nd March, 1867.

1st question by plaintiff's counsel. State your age, residence, occupation, length of time you have pursued it, whether you know Bollingbrook and Ben Lomond, and your estimate of their present value?

Answer. I am nearly 53 years of age. I reside nearly three miles from Upperville; I reside on and own a farm of 800 acres on the Goose Creek. I am a farmer, and have been for over 30 years. I know the places—that is, I know where they are; have been on them; I have passed around and through them; have never looked over them much. I do not know how a man can estimate them without a better knowledge of them, and I have never looked at the buildings on them, or at the places, with a view to an estimate of their value. I should think with a knowledge that I have of the improvements, at a random estimate in my own mind, Bollingbrook would be worth $70 per acre, or in that neighborhood—I mean in the present greenback currency. I have only

passed through Ben Lomond, and cannot say how much mountain-land there is in it, nor do I know the boundaries. I can only estimate it by the neigborhood lands. I would put it at $32 or $33 per acre, in the same currency.

2d question by same. Do lands, as far as you have heard of sales, or as they are held in this region now, command at present in greenbacks, the advanced price in their gold value before the war, due to the depreciation of greenbacks?

Answer. No; lands rate generally now in greenbacks at same price they stood at before the war in gold.

3rd question by same. Are you well acquainted with lands
348 in this region, and the rates of value at which they are and have been held for years past?

Answer. I have lived in the neighborhood nearly all my life. I have bought more than I have sold; I have sold but little. I have bought two tracts of land recently at a price in greenbacks which they would have sold for before the war in gold, or something less than they would have sold for.

4th question by same. Would lands during the war, looking to dangers from depredation by the enemy, have commanded the same real price in gold or its equivalent in other currency, which it did before the war, or would now?

Answer. I think not.

5th question by same. Was there much apprehension by the landholders of this region of destruction of buildings, stock, &c., during the war?

Answer. Not until the latter part of it, not until the enemy began to burn fences and buildings. There was no idea they would do as badly as they did, until the fact was realised.

Cross-examined by deft.'s counsel:

1st question. Do you not reside immediately upon the most public thoroughfare in this vicinity, and the one most frequently used by the enemy during the war?

Answer. I do; on the Ashby's Gap road.

2d question. In estimating the value of land now as being the same in greenbacks that it was before the war in gold, do you not refer to such lands as are held by entangled debtors, who are under constraint to sell, and who can use the greenback dollar to pay a gold dollar of indebtedness?

Answer. I estimate by the land thrown in market.

3d question by same. Do you know of any unindebted individuals who are willing to sell their lands at the same price in greenbacks that they asked in gold before the war?

Answer. I have heard of no one offering their lands for sale who were not in want of money.

4th question by same. What price in gold would you now put upon the entire estate now held by Mr. Bolling in this neighborhood?

Answer. I should have to go into a calculation to know at what price to put it in gold.

5th question by same. Is not the estimate which you have given made without reference to the fluctuations in gold? In other words, would you have estimated these estates last July as you do now?

349 Answer. I reckon I should have put the same price last July that I do now.

THOMAS GLASCOCK.

Deposition of George Brown, taken same time as the one last above.

1st question propounded to Thos. Glascock.

Answer. I am fifty-four years of age. I reside within a half-mile of Upperville, on the Ashby Gap turnpike. I am a farmer at present, and have been for twenty-one years. I have been around and about the estates referred to, and some little on them. I don't know the character of Bollingbrook particularly, but it is good land. Ben Lomond, I should hardly consider as second-rate land. I should think $60 is as much as Bollingbrook would bring in market, in present currency of greenbacks; I would not like to pay over $30 per acre for Ben Lomond in the same currency.

2d question propounded to Thos. Glascock.

Answer. I think lands can be bought now for the same price, in present currency, that they could be bought for in the currency before the war.

3d question propounded to Thos. Glascock.

Answer. I do not profess to be well acquainted with the value of land; I have neither bought nor sold a great deal.

4th question propounded to Thos. Glascock.

Answer. I think not.

5th question propounded to Thos. Glascock.

Answer. Yes; I think there was some considerable apprehension, and especially towards the last of it.

Cross-examined by defendant's counsel:

1st question. Did the apprehensions of which you speak in your reply to the 5th question exist as to houses, &c., in the winter of 1862–'3?

Answer. Yes, sir; to some entent, but not so alarmingly as later.

2d question. What is the difference in value between first and second class land in the Upperville neighborhood. For example, putting first-class land at $60 per acre, what would be the price of the next grade?

Answer. The next grade would be between $40 and $50, but as I observed in my answer, I did not consider that second-rate land.

350 There is no timber on that, and no improvements.

3d question. Are not the farms of Ben Lomond and Bolingbroke contiguous, and do they not now constitute one farm?

Answer. They join at one corner—a short line; they are held by one man; but I don't know that I should call them one farm. One is kept up more as a paying farm rather, and Ben Lomond is worked very little, but both are held, as I said, by one man, and worked, as far as they are worked, by same force.

And further saith not.

GEO. BROWN.

Deposition of George Calvert, taken same time as the above.

1st question propounded to Thos. Glascock.

Answer. I am 71 years of age. I reside in Upperville. I am doing nothing but farming a little. I took the census in 1860 for the north-eastern division of the county, including Bollingbrook and Ben Lomond. I have known these estates partially since 1819. To estimate the value is a hard question. I do not know much about the value of money. I estimate the two places together at about $55 per acre in good money. I mean the standard value of gold and silver of our country. I do not mean fluctuating greenbacks. I don't know how

to estimate the two places apart, for I do not know how much is in each. I think to a man whom the property suits they ought to be worth that.

2d question by same. Do lands in this region, as far as you have heard of sales, sell for as much as they did before the war?

Answer. I think not, as far as I can now call to mind.

3d question by same. Have you heard of any sales for gold and silver?

Answer. I remember of none. There was a sale for gold during the war of old Dr. Withers' place.

4th question by same. Where was that place and how much did it bring?

Answer. Ten or twelve miles from here. I forget how much it brought in gold.

5th question by same. For what currency is land sold in this neighborhood when sales are made?

Answer. I cannot say. I only notice that all sales I see reported are lower than before the war, but I cannot say what currency.

351 6th question by same. What value per acre would you put on Bollingbrook now? It contains 769 acres.

Answer. I would put it at $65 per acre; I don't know that it ought not to be $67.

7th question by same. What value per acre on Ben Lomond now? It contains 341 acres.

Answer. I would put it at between $30 and $35, as the difference which would arise between my estimate of the whole and the price of Bollingbrook at $65 or $67.

And further saith not.

GEORGE CALVERT.

And on the 29th March, 1867, the plff. filed a paper in this cause in these words:

The deposition of Owen T. Holmes, taken pursuant to the notice herewith returned and the endorsements thereon, on the 25th of February, 1865, at the law-office of Matthew Harrison, in the town of Leesburg, Loudoun County, Virginia, to be read in evidence on behalf of the defendants in the suit now depending in the hustings court for the city of Richmond, before the Hon. Wm. H. Lyons, the judge thereof, in which Messrs. Fraser, Trenholm & Co. are pltfs. and G. Lersner and R. B. Bolling are defts.

The taking of this deposition was adjourned, by consent of parties, by their counsel, from 25th February, 1865, to this 18th day of March, 1865.

1st question by counsel for defts. Do you know Gustavus Lersner, one of the defts. in this case?

Answer. I do.

2nd question by same. Did you go with him to Baltimore upon any occasion? If so, when and for what purpose?

Answer. I was with him in Baltimore in December, 1862. I went with him from this place to that city. I was going there on my own business, and met with him casually in Leesburg, and there he handed to me a sum of money, nearly two hundred thousand dollars, which sum of money I delivered to said Lersner on the same day in the store-house of Dan'l Miller & Co., of Baltimore. The said money consisted of Virginia and other Southern State bonds; also of drafts on New York.

3rd question by do. Do you know what was done with the money before returning to Leesburg?

352 Answer. Thirty thousand dollars of the amount was placed in the firm of John W. Rea & Co., of New York, and thirty-five thousand dollars more of the same funds were invested in provisions, which were shipped and consigned to the house of Robert Rea & Co., Liverpool, England. Ten thousand dollars of the bonds were brought back to Virginia. This is all I know positively of the disposition made of the said funds.

4th question by do. Did you start a second time in company with said Lersner? Who else was in company? State where to, when it was, and what was the object of the trip?

Answer. I did start a second time in company with him (Robt. B. Bolling was also in company) to New York in March, 1863. The object of the trip was to adjust some money matters betweeen Mr. Bolling and Mr. Lersner.

5th question by do. Did you make the trip; and, if not, what prevented it?

Answer. Mr. Bolling made the trip; Mr. Lersner was stopped by the military at Berlin in Md., and I returned with him.

6th question by do. Did you subsequently go to New York? State when and for what purpose.

Answer. I did go to New York in two or three days thereafter. I went there with an order from Gustavus Lersner for some ten or fifteen thousand dollars on John W. Rea & Co.

7th question by do. Did you get the money, and if not why not?

Answer. I did not get it because they had it not, and because they had invested the money and shipped provisions to Liverpool, to the house of Robert Rea & Co.

8th question by do. Did they, John W. Rea & Co., send any message by you to Gustavus Lersner in reference thereto? If so, state the purport thereof?

Answer. I was told by Ignatius Lersner, one of the firm of said John W. Rea & Co., to tell Gustavus Lersner that they, John W. Rea & Co., had made the shipments to the firm of Robert Rea & Co., of Liverpool, and that he, Gustavus Lersner, could draw on said Robert Rea & Co. for exchange.

9th question by do. Did Ignatius Lersner state the amount for which Gustavus Lersner could draw?

Answer. He did not.

10th question by do. Are you sure that he told you that Robert Rea & Co. lived or did business in Liverpool?

Answer. I am sure he did. He told me in March, 1863, and January, 1865.

353 11th question by do. Did you deliver the message above referred to to Gustavus Lersner; if so when?

Answer. Immediately upon my return in March, 1863, I delivered said message to Gustavus Lersner.

12th question by do. Did you state to Gus. Lersner that Robert Rea & Co. was the firm upon which he said Gus. Lersner should draw, and that they did business in Liverpool?

Answer. I did.

13th question by same. Was this message from Ignatius Lersner to Gustavus Lersner given to you at the counting-house of John W. Rea & Co., and upon the presentation of the order for ten or fifteen thousand dollars above referred to?

Answer. It was.

1st question by John Janny, counsel for plffs. Where is and has been your place of residence for the last ten or fifteen years?

Answer. In Loudoun County.

2d question by do. When these funds were placed in your hands by Gustavus Lersner, did you count them?

Answer. I did not count them minutely, but saw there was a number of drafts of large amounts, and of bonds.

3rd question by do. Did you, on the first visit, accompany Mr. G. Lersner any further than Baltimore?

Answer. I did not.

4th question by do. What is the relationship, if any, between Ignatius Lersner and Gustavus Lersner?

Answer. They are brothers.

5th question by same. Have you any knowledge whether any funds were placed in the hands of John W. Rea & Co., or that any goods were shipped on account thereof, except what you derived from Gustavus Lersner or his brother Ignatius?

Answer. I have not any knowledge beyond what Ignatius and G. Lersner told me, except what I had from Morris Lersner, a brother of theirs, who told me that Gustavus Lersner had placed funds in the hands of John W. Rea & Co.

6th question by do. Have you any personal acquaintance with John W. Rea, of the firm of John W. Rea & Co.?

Answer. I was introduced to him, but have no personal acquaintance with him, and should not know him if I were to see him.

7th question by do. By whom were you introduced to him?

Answer. By Ignatius Lersner.

8th question by do. Was your visit to New York in March,
354 1863, the first you had made there on Mr. Lersner's business?

Answer. It was.

9th question by do. You spoke of having been there in January, 1865. At whose instance did you go?

Answer. On that occasion I went on my own instance, on no business of Mr. Lersner at all.

10th question by do. You say that among the funds delivered to you by Mr. Lersner in Leesburg there was a considerable amount of drafts on New York. Do you remember the names of any of the persons by whom they were drawn?

Answer. I do not.

OWEN T. HOLMES.

The above deposition was taken on the day and at the place above named before the subscriber, a notary public for the county of Loudoun, Va.

W. A. POWELL,
Not. Pub.

Time of taking deposition, 1½ hours.
Fee, whatever the law allows.
A copy—teste:

RO. HOWARD, *Clk.*

And on the 30th March, 1867, other depositions on behalf of the plaintiff were received from Comr. John W. Pugh, in these words:

Deposition of Owen T. Holmes, taken 29th March, 1867.

1st question by plaintiff, by counsel. Do you know the parties to this cause?

Answer. I do.

2nd question by same. Did you go with Mr. Lersner to Baltimore at any time in 1862? If so, state the date, and what you may know about the funds which Lersner had in his hands at that time, and what disposition of those funds was made.

(Defendant's counsel excepts to this question.)

Answer. I went with Gustavus Lersner to Baltimore in December, 1862. He had some two hundred thousand dollars of funds in his hands at that time. Thirty thousand dollars of that sum was invested in the firm of John Rae & Co., in New York, and thirty-five thousand dollars more was placed at their disposal, which was invested in provis-
355 ions and shipped to Liverpool. Some ten thousand dollars of Virginia State bonds was brought back again. That is all that I know of the disposition of the funds of which I have spoken.

3d question by same. To whom was the consignment made in Liverpool?

Answer. To the firm of Robt. Rea & Co. I know it was "Rea." I think Robt. Rea & Co. was the firm. I think the name was Robt. Rea, (and then said isn't that it?)

(Deponent here explained that he didn't know that there was any middle letter to Robt. Rea.)

4th question by same. Did you start at any subsequent time northward with said Lersner? Who else was in company? State where to, when it was, and what was the object of the trip?

Answer. I started at another time northward with Lersner, in March, 1883. Robert B. Bolling was in company. We started to go to New York to adjust some money matters between Lersner and Bolling.

5th question by same. Did you make the trip?

Answer. Robt. Bolling made the trip. Gustavus Lersner was turned back at Berlin, Maryland, by the Federal soldiers, and I returned with him.

6th question by same. Did you subsequently go to New York for Mr. Lersner? If so, when, and for what purpose?

Answer. I did go to New York for Mr. Lersner two or days thereafter. I took an order on the house of John Rea & Co. for some ten or fifteen thousand dollars. The order was from Gustavus Lersner.

7th question by same. What were you to do with the money, if obtained?

Answer. I was to bring it home to Virginia to Gustavus Lersner.

8th question by same. Did you get the money?

Answer. I did not.

9th question by same. Why not?

Answer. Because they had made large shipments of provisions to Liverpool, and their money had been invested in those provisions; but that Gustavus Lersner could draw on the house of Robt. Rea & Co., Liverpool.

10th question by same. Did they send any message by you to the plaintiff, Gustavus Lersner, in reference to it?

Answer. I was told that the thirty-five thousand dollars that he had placed at their disposal had been invested in provisions and
356 shipped to Liverpool to the house of Robt. Rea, and that he

(Gustavus Lersner) could draw for that amount on that firm. They told me to say this to Gustavus Lersner.

11th question by same. Which of the firm told you this?

Answer. Ignatius Lersner.

12th question by same. Did he tell you where Robert Rea & Co. lived, or did business?

Answer. He did; at Liverpool.

13th question by same. Did you deliver the message to Gustavus Lersner; and if so, when?

Answer. I did, immediately upon my return; the trip took me 4 or 5 days.

14th question by same. State what message you delivered to Gustavus Lersner.

Answer. I told him that his brother (of the firm of John Rea & Co.) had told me that he could draw on the firm of Robert Rea & Co., of Liverpool, for the money; that his thirty-five thousand dollars, which he had placed at the disposal of John Rea & Co., of New York, had been invested in provisions and shipped to Liverpool; that is what I told him.

15th question by same. Can you state in what month of the year 1863 you returned to Virginia from that trip?

Answer. It was in March.

16th question by same. From whom did you derive the information that thirty thousand dollars of the fund that Lersner had in 1862 was invested in the house of John Rea & Co., and that the thirty-five thousand dollars was shipped to Liverpool?

Answer. I derived the information that the "thirty thousand dollars was invested in the house of John Rea & Co." from Gustavus Lersner and Ignatius Lersner. I derived the information that the thirty-five thousand dollars was shipped to Liverpool from Ignatius Lersner.

(Deft.'s counsel excepts to this question and answer.)

Cross-examination:

1st question by deft., by counsel. Where do you reside, and what was your pursuit during the war?

Answer. I reside in Loudoun County; I had no regular pursuit during the war.

2d question by same. Did you ever take the oath of allegiance or fidelity to the confederate government, or to the United States Government during the war?

Answer. I never took the oath of allegiance or fidelity to the
357 confederate government during the war, but I did take the oath of allegiance or fidelity to the United States Government during the war.

3rd question by same. Did you ever pass to Richmond through Gordonsville, on the cars, during the war?

Answer. I never did.

4th question by same. Did you go to Richmond during the war? If so, how did you travel, and upon what authority.

Answer. I did not go to Richmond during the war.

5th question by same. Were you in the habit of passing into the confederate lines, at any time during the war; and upon what authority did you pass?

Answer. I never did pass within the confederate lines during the war.

6th question by same. Were you in the employment of the Federal Government during the war? If aye, in what capacity?

(Pltff.'s counsel excepts to this question as irrelevant.)

Answer. I was not in the employment of the United States Government during the war.

7th question by same. How long have you known that you were to be a witness in this cause?

Answer. I have known it about two years.

8th question by same. Did you not give a deposition in this cause upon another occasion, and have you not been engaged in studying it this morning?

Answer. I did give a deposition in this case upon another occasion; I simply glanced over it this morning.

9th question by same. What are your relations to Lersner—I mean what is your employment by him?

Answer. I am not employed by him at all; I am in my own employment; my relations with Mr. Lersner are friendly.

10th question by same. Were your services to him during the war gratuitous?

Answer. They were, except my expenses were borne.

11th question by same. Had you any interest in any of his different speculations?

Answer. I had not.

12th question by same. You have spoken of a visit to Baltimore, 1862, with Gustavus Lersner, in which he had large sums of money in his hands. How do you know that he had this money and its amount, and in what kind of funds was it?

Answer. He gave it to me at Leesburg to carry through the lines for
him; I looked over it, when he handed it to me, and saw that it
358 amounted to about two hundred thousand dollars. It was principally in drafts on New York, and some of it was in Southern State bonds.

13th question by same. Do you remember by whom and upon whom any of these drafts were drawn, and why Gustavus Lersner was withdrawing his funds from the Confederate States?

Answer. I do not remember by whom or upon whom any of the drafts were drawn, nor do I know why Lersner was withdrawing his funds from the Confederate States.

14th question by same. I understand you that you carried these funds to Baltimore, and that the investments you have spoken of in your answer to pltff.'s 2nd question were made at that time, and in the manner indicated in that answer; am I correct in that impression?

(Pltff.'s counsel excepts to this question, because deponent does not say that the investments were made at that time.)

Answer. I carried these funds to Baltimore in December, 1862; I did not say that the investments were made at that time; they were made in the manner indicated in the former answer, but not at that time.

15th question by same. Will you explain why, in your answer referred to, you coupled your visit to Baltimore in December, 1862, with an account of the manner in which the money was invested, if you did not mean to say that the events were contemporaneous or connected with each other?

Answer. This thing is mixed up a good deal in my mind, and I told the story as it came uppermost in my mind; that is about the only explanation I can give of it.

16th question by same. What did you do with this money; to whom were you to carry it, and what were your directions in reference to it?

Answer. I had no directions about it. Gustavus Lersner and I trav-

elled together to Baltimore. I delivered the money to him in the house of Daniel Miller & Co.

17th question by same. When did you derive the information that thirty thousand dollars had been invested in the house of Jno. Rea & Co., and thirty-five thousand placed at their disposal?

Answer. It was some month or six weeks after I went with Lersner to Baltimore.

18th question by same. How do you know to whom the consignment to Liverpool, referred to in your former answers, was made? Is your information based upon hearsay, or upon your own knowledge?

359 Answer. I was told by Ignatius Lersner, one of the firm of John Rea & Co., that they had made such consignment.

(Deft.'s counsel excepts to this answer as not being responsive to his question.)

19th question by same. You say that you have no connexions with Lersner, and no interest in his affairs; will you explain what you mean by this language used in your answer to plaintiff's 4th question: "We started to go to New York, to adjust some money matters between Lersner and Bolling?"

Answer. That means just about what it says; at that time the Potomoc was blockaded. Lersner and Bolling were a little afraid of "blue scarecrows;" afraid of passing the Federal lines. I simply went along with them to assist them in getting over the Potomac.

20th question by same. I understand then that you did not intend to go further than through the lines, and came back of your own accord?

Answer. I intended to go to New York.

21st question by same. On what business?

Answer. I had no business except to go along with Bolling and Lersner.

22d question by same. Were pleasure-trips of that sort frequent along the border during the war?

Answer. They were not very frequent in our county. I do not know what they were in other parts of the border.

23d question by same. When did you first learn that the thirty-five thousand dollars to which you have referred as being placed at the disposal of John Rea & Co., had been shipped to Liverpool?

Answer. I first learned it in the counting-house of Jno. W. Rea & Co., in New York City, in March, 1863.

24th question by same. Did you ever hear it afterwards?

Answer. Yes, I have. Ignatius Lersner told me again in May, 1863, that he had shipped it.

25th question by same. Was this shipment made to Gustavus Lersner's credit, or to the credit of John W. Rea & Co.?

Answer. I never inquired about that.

26th question by same. What did you understand from what they said upon the subject?

Answer. I understood that they had made the shipment in favor of Gustavus Lersner.

27th question by same. Did they state this in reply to any inquiry on your part? I mean had you called at their house for information on the subject?

360 Answer. I called at their house for information on the subject and they left that impression upon me.

28th question by same. Did you state to Lersner these impressions as the facts? What account did you give him of the mode in which they had disposed of the thirty-five thousand dollars?

Answer. I did state to Lersner these impressions as the facts. I told him that the thirty-five thousand dollars had been invested in provisions, and shipped to Liverpool to the house of Robt. Rea & Co.

29th question by same. Do you know what were Gustavus Lersner's relations to the house of John W. Rea & Co.?

Answer. About all the interest he had in it, was that the whole concern belonged to him.

30th question by same. I understand you to mean that he was substantially the house of Jno. W. Rea & Co.; am I correct in this?

Answer. No, the house of John W. Rea & Co. was composed of John W. Rea, Emil Lersner, and Ignatius Lersner; as I understand they had no funds of their own, but they did business with the money of Gustavus Lersner.

31st question by same. If you know as much as you have stated on this subject, can you state what interest Gustavus Lersner had or was to have in the profits of the house?

Answer. I cannot say positively; I don't know what amount of profits he was to have.

32d question by same. You say that you don't know what amount of the profits he was to have; do you know whether he was to have any?

Answer. I suppose that he was to have some; my reason for thinking so is that he complained very much that he did not get any profits.

33d question by same. Do you know to whom the house of John Rea & Co. made their shipments; did they confine themselves to Robt. Rea & Co.?

Answer. I never heard of them making shipments to any one else.

34th question by same. Do you know how often Gustavus Lersner visited New York between December, 1862, and April or May, 1863?

Answer. I do not know; I know that he went there in December, 1862; I don't think that he visited New York again til' the following summer.

35th question by same. Can you state positively that he did not?

361 Answer. No; he did not visit New York again until the summer of 1863.

36th question by same. When was the house of John Rea & Co. started, and how long did it live?

Answer. It was started about the 1st of January, 1863, and lived until about May, 1863.

36th question by same. What time did you go to New York; was it towards the early or latter part of the month of March?

Answer. I think that it was before the 15th.

37th question by same. How long did you remain?

Answer. Only a few days.

38th question by same. Did you return immediately to Virginia?

Answer. I did.

39th question by same. How long before you saw Gustavus Lersner?

Answer. The next day.

40th question by same. Did you have any written communication with him?

Answer. Only verbal.

41st question by same. How long before you returned to New York?

Answer. I went the following May.

42d question by same. For what purpose did you go?

Answer. I went there to see after Lersner's interest in the house of John W. Rea & Co.; this was about the 26th or 27th of May.

43rd question by same. Did you investigate the affairs of that house?

Answer. No further than to find that everything was in the hands of the sheriff.

44th question by same. Had the property of the concern been seized at the time by the creditors?

Answer. Yes.

45th question by same. Did you see Ignatius Lersner at that time?

Answer. I did.

46th question by same. Had the creditors gotten possession at that time of all the assets of the house?

Answer. I do not know; they seemed to have possession of everything that was in the building.

47th question by same. Did you start South with Ignatius Lersner?

Answer. I did.

362 48th question by same. Were you not aware of the fact that he had a large amount of funds at that time?

Answer. No, I was not.

49th question by same. Do you not know that he had a large amount of money on his person at that time?

Answer. I do not know it.

50th question by same. When asked questions by deft's counsel, why is it that you confine your answers strictly to what is within your own knowledge, but in answer to the interrogatories of pltff.'s counsel, have shewn yourself prompt, ready, and eager to testify, not only to what you know, but to what you heard, if it were favorable to plaintiff?

Answer. I had not been aware of that.

51st question by same. How far did Ignatius Lersner get South with you?

Answer. He got as far as Lovettesville, Loudoun County, Virginia.

52d question by same. Why was he arrested?

Answer. Because of an order of General Schenk, who was then commanding that department.

53rd question by same. Do you know at whose instance he was arrested?

Answer. I suppose he was arrested at the instance of his New York creditors; the military said so.

54th question by same. Do you think that his New York creditors would have sent to Virginia to arrest him if he had not run off with the money of the house?

(Pltff.'s counsel excepts to this question for every reason.)

Answer. I don't think that they would have sent for him if they had not supposed he had the money of the house.

54th question by same. Where was Gustavus Lersner when you returned?

Answer. I do not know, exactly; he was somewhere in Virginia.

55th question by same. Was he not near Lovettsville at the time of the arrest of his brother Ignatius?

Answer. I think he was about 10 miles from Lovettsville, as nearly as I can come at it.

56th question by same. How long was it after the arrest of his brother before you saw him?

Answer. Four or five months.

57th question by same. At what time was Ignatius Lersner arrested?

Answer. The 3d of June, 1863.

363 58th question by same. Did you have any communication wit Gustavus Lersner immediately after your return to Virginia?

Answer. I did not.

59th question by same. When in New York, on the trip you have jus spoken of, did you ascertain whether the house of John W. Rea & C in New York had made any shipments to Robt. Rea & Co. on accoun of Gustavus Lersner?

Answer. No further than I had learned before; I got no more info mation upon the subject.

60th question by same. Were you not sent there to ascertain tha very thing, and to look after the interests of Gustavus Lersner?

Answer. I was sent there to look after the interests of Gustavu Lersner, but not to make any particular investigation.

61st question by same. In what way were you then to look after hi interests?

Answer. I went there to look after the general business condition o the house. Gustavus Lersner did not know that the firm of John W Rea & Co. had failed a few days before I went there.

62d question by same. Did you know when you started from Virgini that Gustavus Lernser had drawn drafts on Liverpool on the faith o information which you say you brought him, of consignments havin been made abroad on his account?

Answer. I did not know it when I started from Virginia.

63d question by same. How long had it been before you left Virgini since you had an interview with Gustavus Lersner?

Answer. I had an interview with him the day before I left.

64th question by same. Did he tell you then that he had drawn suc drafts?

Answer. He did not.

65th question by same. Were you informed in New York that he ha drawn such drafts?

Answer. Not that I remember of.

66th question by same. Have you no recollection of Ignatius Lersner giving you such information?

Answer. I have not.

67th question by same. How many times did you go North for Gus tavus Lersner?

Answer. Four or five times.

364 68th question by same. At what time, and where, did you giv him information of consignments having been made abroad o his account?

Answer. I gave him information the day after my return in March 1863, at my father's, in Loudoun County.

69th question by same. Was he not at your father's when you reache Loudoun County on your return, the 3d of June?

Answer. He was there, or somewhere in the neighborhood.

70th question by same. Had you not every reason to believe that Gus Lersner had drawn the foreign drafts upon the faith of the representa tions which you said that you had made to him?

Answer. I had not.

71st question by same. Did you not say that he had sent you to Ne York for money just before that, and that you had informed him tha the money which he expected to draw in New York had been investe in provisions, which had been shipped abroad, and on which he coul draw?

Answer. Yes; I gave him that information.

72d question by same. Where did Lersner go after you gave him that information?

Answer. He went South, and I did not see him any more until about the 25th of May.

73d question by same. Was his going South occasioned by the information that you brought him?

Answer. Not that I know of.

74th question by same. Did you know at that time of the contract for the sale of Bolling's farm?

Answer. I knew that Bolling had sold his farm to Lersner when I went to New York in May.

75th question by same. Did you know it when you last saw Lersner at your father's house in March?

Answer. I had information to that effect from Bolling and Lersner both.

76th question by same. Was Lersner, at the time of your last interview with him in March, attempting to raise money to meet his last payment on this land?

Answer. Not that I was aware of.

77th question by same. What became of Gustavus Lersner after you returned the 3*n*d of June?

Answer. On the 3d day of June Ignatius Lersner was arrested in Lovettsville. I was taken back also to give testimony. Gus-
365 tavus Lersner, hearing of the trouble of his brother, left and went South—to Richmond, or somewhere.

78th question by same. Did he not go on to New York shortly after that time?

Answer. Shortly after that time (probably a month after) he went to New York by way of Nassau.

79th question by same. How long had you and Ignatius Lersner been in Lovettsville when you were arrested?

Answer. About thirty minutes, I suppose—perhaps an hour.

80th question by same. Were you kept closely guarded as well as he?

Answer. No; I was not.

81st question by same. Did you not have a good many friends and acquaintances in Lovettsville?

Answer. Yes.

82d question by same. Did Ignatius send any sort of communication to his brother, oral or written?

Answer. Not that I remember of.

83d question by same. How long were you kept in Baltimore?

Answer. About twenty-four hours before I could get away; the train didn't leave.

85th question by same. Where did you go after your release?

Answer. I came home by the way of Berlin.

84th question by same. Where was Gustavus Lersner when you reached home?

Answer. He had gone South.

86th question by same. What became of Ignasius Lersner after you were carried to Baltimore?

Answer. He was examined before the provost marshal, was released, and went on to New York.

87th question by same. Did you not have funds for Gustavus Lersner at the time of your arrest at Lovettsville?

Answer. No.

88th question by same. Did you not have papers or communications of some sort for him?

Answer. I had none for Gustavus Lersner.

89th question by same. At the time of your arrest in Lovettsville, did you send any information to Lersner about his house in New York having blown up?

Answer. I sent him word that his house had failed.

90th question by same. Did Gustavus Lersner have any employment under the confederate government?

366 Answer. I heard that he belonged to the quastermaster's department, or rather that he bought horses for the government; I never heard him say so.

91st question by same. Did he not act as an agent for Major Barbour, of the quartermaster's department?

Answer. I heard it said so.

92d question by same. Was Gustavus Lersner's residence in Loudoun during the war?

Answer. No.

93d question by same. Is Gustavus Lersner a foreigner, do you know? (Plaintiff's counsel excepts to this question as irrelevant.)

Answer. He is a foreigner. I do not know whether he is naturalized or not.

94th question by same. How long were you in New York in May, 1863?

Answer. About five days.

Direct examination resumed:

1st question by plaintiff, by counsel. What is your age?

Answer. Twenty-seven.

2d question by same. How many times have you given your deposition in regard to these transactions?

Answer. This is the third time.

3d question by same. When and where was the first time?

Answer. In Leesburg, in the spring of 1865.

4th question by same. You have said in one of your answers (in substance) that "John Rea & Co. did business with Gustavus Lersner's money;" do you know whether he lent the money to the firm, or to either of the partners, or whether he was a partner in the firm?

Answer. I do not know what were the conditions of their having the money, nor do I know whether he was a partner.

5th question by same. Did you see Mr. Bolling in any of these visits to New York?

(Defendant's counsel excepts to this question.)

Answer. No, I never saw him in New York.

6th question by same. Why did Lersner, on the occasion of your trip to Baltimore, give you his money to take?

Answer. Because he was afraid he might be searched.

7th question by some. In what religious persuasion were you reared?

Answer. Not particularly in any. I was raised under the
367 influence of the Society of Friends; my father was a member of that society.

And further this deponent saith not.

OWEN T. HOLMES.

Deposition of Robert Bentley, jr., taken same time as the foregoing.

1st question by plaintiff, by counsel. What is your age, place of residence, and business?

Answer. I will be 45 years old in June. My place of residence, Fauquier County, near Upperville; and am a farmer.

2d question by same. Do you know of any destruction by the enemy upon the place on which you reside?

Answer. I do. There was a barn, corn-house, and granary burned by Sheridan's command in December, 1864, I think.

3d question by same. Upon what place do you reside, who is the owner of the place, and how far is it from Bollingbrook?

Answer. I reside in the place known as "Elmwood," owned by Gustavus Lersner, and separated from Bollingbrook by a public road.

4th question by same. Were you present at the office of Lancaster & Co. at the time of the payment of any money, by the plaintiff to the defendant, upon the lands in controversy in this case; if so, when was it, and who was present?

Answer. I was at the office of Lancaster & Co., in Richmond, when Mr. Lersner made his last payment to Mr. Bolling. I can't fix the day exactly; it was about the middle of April, 1863, that is my impression; it might have been a little sooner or a little later. There were present, as well as my memory serves me, Mr. Lancaster, Mr. Lersner, and Mr. Bolling. The clerks were there, but who else I cannot say.

5th question by same. What occurred between Mr. Bolling and Mr. Lersner as to the amount to be paid upon the settlement, and how was it finally arranged?

Answer. I was not present when they were settling. I was in the front part of the office, setting, as well as I recollect, at the window. Mr. Lersner, Mr. Bolling, and Mr. Lancaster were either in Mr. Lancaster's private room or behind the counter, (I can't say which now,) engaged. When Mr. Bolling approached me and remarked that the affair was terminating as he had anticipated, that Mr. Lersner was trying to throw obstacles in the way, I asked him what those
368 obstacles were, (as well as I recollect.) He replied that Mr. Lersner was not willing to allow him the difference between what confederate 8 per cent. bonds were worth at that time and the time when the money was due, which was the 15th of March, nor was he willing to allow him interest. I believe about that time Mr. Lersner came up to where we were talking. I took Mr. Lersner aside and told him that Mr. Bolling claimed nothing more than what was right and fair; that it was *small too* a matter to quibble about, and to go and settle with him. Lersner left me; they in a short time settled their matters, and both (Bolling and Lersner) returned to where I was, Mr. Bolling remarking that the difficulty had been satisfactorily arranged. That is about all I know of it. We then left the office.

Cross-examination:

1st question by defendant, by counsel. Have you not been an intimate friend and associate of Gustavus Lersner for several years?

A. I have been on intimate terms with Mr. Lersner since about the 20th of March, 1862, when our army fell back from Manassas. I never had but one conversation with him previous to that time that I remember of.

2d question by same. Were you not engaged with him in his speculations?

Answer. No.

3d question by same. Of whom did Lersner buy "Elmwood," what currency did he use in paying for it, and when did he buy it?

Answer. He bought it of George W. Bolling, of Petersburg; I don't know when, or what currency he used in paying for it.

4th question by same. Are you paying him rent for it?

Answer. I am not.

5th question by same. Were you not mixed up during the war, or since, in some wood speculation or contract of Lersner's on James River, and are you not now concerned in interest in a controversy similar to this, now conducted in the county of Loudoun, with some widow or other person?

Answer. I was not mixed up with Mr. Lersner during the war, nor have I been since the war, in any speculation or contract. I am not concerned in interest in any controversy similar to this.

6th question by same. Did you ever offer "Elmwood" for sale through the house of Carter & Wright, in New York; and, if so, did you have any authority from Lersner for doing so?

369 Answer. I never heard of Carter & Wright, and I never offered Elmwood for sale.

7th question by same. Where does Lersner now reside?

Answer. He has been staying most of the winter in Washington, I believe.

8th question by same. Have you not been the agent through whom notice has been served for taking depositions, and witnesses procured to testify in this case?

Answer. I have been written to by Mr. Tucker in regard to the persons whose depositions he wanted to take, and the persons he wanted to be present, when he knew Mr. Lersner was not at Elmwood, and I attended to those things as the mutual friend of Mr. Tucker and Mr. Lersner.

9th question by same. If you pay no money for the use and occupation of Elmwood, what do you expect to satisfy Lersner in?

Answer. I don't know, sir. I was invited by Mr. Lersner in 1864, when my health become such that I had to leave Richmond, to take possession of his farm. I did so. From that time to this nothing has passed between us as to any compensation or any rent. Mr. Lersner makes it a pleasant home for me.

10th question by same. Why, if you were not a partner in Lersner's speculations, and had known him only a short time previous to the interview at Lancaster's, did you feel authorised in that interview to counsel Lersner and urge him to accede to Bolling's demands?

A. I had known Mr. Lersner for twelve months previous to the settlement at Lancaster's. I was acquainted with all his business transactions. He generally told me everything that he did, and consulted me on all occasions.

11th question by same. You say that you told Lersner that Bolling's demands were fair and right, and that you urged their acceptance; had Lersner shewn a disposition to overreach Mr. Bolling and perpetrate injustice upon him?

Answer. Never that I could hear of or see. I only know what Mr. Bolling told me.

12th question by same. Have you ever heard Lersner say what he intended to do with Bollingbrook if he had the luck to gain this suit?

Answer. I heard him say he intended living on it.

13th question by same. In that event were you to have Elmwood, or any other consideration?

370 Answer. I have never been so fortunate as to have been told by Mr. Lersner that either upon his accession to Bollingbrook or at his death I was to be the heir of Elmwood.

14th question by same. At what period do your hopes point to as that at which the good fortune you referred to will meet with its fruition?

Answer. I have no expectancy from Mr. Lersner.

15th question by same. Have you any other home of your own than that which you now have from Mr. Lersner?

Answer. My home is where I reside. I own a plantation in Loudoun, which I farm.

16th question by same. Why, if you have a plantation and home of your own, do you choose to be dependent on Mr. Lersner for one?

Answer. I don't consider that I am dependent on Mr. Lersner for a home. I find it more pleasant and agreeable to live there than at my own place—more comfortable and healthy.

17th question by same. Were you not put there as a sentinel to overlook "Bollingbrook," in the service of Lersner?

Answer. I certainly was not.

Direct examination resumed:

1st question by plaintiff, by counsel. Where does Mr. Lersner make his home when he is in Fauquier?

Answer. At Elmwood, in my family.

2d question by same. Do you cultivate Elmwood?

Answer. I do, sir.

3d question by same. In what condition was the place left by the war as to farming capacity?

Answer. In very bad order; the fencing down, and the fields grown up in bushes and briars.

4th question by same. Are you cultivating the place with a view to its being put in order, and its improvement?

(Defendant's counsel excepts.)

Answer. I am, sir.

5th question by same. Do the proceeds or croppings of the place realize large or small profits after paying the expenses of cultivation and improvement?

Answer. Up to this time they never have realized anything.

Cross-examination resumed:

371 1st question by defendant, by counsel. Cannot any farm in the neighborhood of Elmwood be readily rented for at least one-third of the crops?

Answer. I don't know, sir. I know some in the neighborhood that I would give one-third of the crops and be at the expense of the farming.

2d question by same. My question referred to the general rule of renting in your neighborhood. Don't you know that farms that are rented in your neighborhood command at least that I have designated?

Answer. I know of no farms rented in the neighborhood. I know of tenants who rent fields, but what share of the crops they give I don't know.

And further this deponent saith not.

ROB. BENTLEY, JR.

And on the 12th April, 1867, exceptions by plaintiff and defendant were filed in this cause in these words:

BOLLING *vs.* LERSNER.

The defendant, by his counsel, excepts to the deposition of J. R. Tucker, because the supposed facts to which he testifies were obtained professionally.

JOHN S. MOSBY AND W. H. PAYNE, *P. D.*

The exception made to the deposition of J. R. Tucker in the case of Lersner vs. Bolling, for want of notice, is withdrawn, and it may be read subject to the exception to it, owing from his having been counsel for defendant in the suits referred to in the same.

W. H. PAYNE, *P. D.*

The plaintiff, by counsel, excepts to the depositions of R. Welby Carter and H. G. Dulaney, because taken without service of notice upon the plaintiff according to law.

TUCKER, *for Plaintiff.*

The evidence of service of said notice is endorsed thereon in these words:

"FAUQUIER COUNTY, *to wit:*

372 "Personally appeared before me, John Carr, a justice of the peace for the county aforesaid, Wesley White, and made oath that he had this day left a copy of the above notice at the house of Mr. Robert Bentley, (Mr. Lersner's home in this county.)

"Given under my hand this 12th day of January, 1867.

"JOHN CARR, *J. P.*"

And at a circuit court held for Fauquier County, on the 12th day of April, 1867:

This cause came on to be fully heard this 12th day of April, 1867, upon the bills and exhibits of the plaintiff, the answers and exhibits of the defendant, and the depositions and other evidence read in the cause, and was argued by counsel; whereupon, by consent of the parties by their counsel, the same is submitted to the judge of this court in vacation, and it is further agreed, by like consent, that such decree as his honor shall decide to enter may be entered upon the record in vacation as a valid decree in this cause, and to have like effect as if rendered and entered thereon at the present term of this court.

And at a circuit court held for said county, on the 13th day of September, 1867:

This cause came on to be heard on the bill, answer, exhibits, depositions of witnesses, and exceptions thereto, and was argued by counsel; on consideration whereof the court doth adjudge, order, and decree that the contract of sale between the complainant and defendant be annulled and declared void, for reasons stated in a written opinion filed in the cause, and that the complainaint do recover of the defendant the sum of nineteen thousand seven hundred and eight dollars and ninety cents, with six per cent. interest on sixteen thousand four hundred and fifty dollars, part thereof from the 10th day of March, 1863, until paid, and with like interest on nine hundred and fifty-eight dollars and ninety cents, other part thereof from the 18th day of April, 1863, until paid, and with like interest on twenty-three hundred dollars, the residue thereof, from the 7th day of September, 1865, until paid, subject, however, to the provisions of the act of assembly staying the collection of debts. And the court doth further adjudge and decree that the defendant do pay to the complainant his costs by him expended in prosecuting this suit.

373 From the record.

A copy. Teste: JNO. S. BYRNE, *Clerk.*

The clerk's fee for this record is $99.66.

JNO. S. BYRNE, *Clerk.*

374 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on Thursday, the twenty-fifth day of March, 1875.

Be it remembered that heretofore, to wit, at a supreme court of appeals of Virginia, held on the 5 day of March, 1874, upon the petition of Robert B. Bolling, an appeal was allowed him from a decree pronounced by the circuit court of Fauquier County on the 23 day of December, 1873, in a suit in chancery therein depending, in which Gustavus Lersner was plaintiff, and the petitioner was defendant, upon the said petitioner, or some one for him, entering into bond, with good security, in the clerk's office of the said circuit court in the penalty of eight thousand dollars, conditioned as the law directs.

(The said petition being inserted in a previous part of this transcript, is omitted here.)

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 28 day of January, 1875, this cause was fully heard upon the transcript of the record of the decree aforesaid and the arguments
375 of counsel, but because the court was not then advised of its decree to be pronounced in the premises, time was taken to consider thereof.

And now, at this day, to wit, at a supreme court of appeals of Virginia, held at the State court-house in the city of Richmond on the same day and year first herein mentioned, to wit, Thursday, the 25 day of March, 1875.

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. Therefore it is decreed and ordered that the same be affirmed, and that the appellee recover against the appellant damages according to law, and his costs by him about his defence in this behalf expended.

Which is ordered to be certified to the said circuit court of Fauquier County.

The reasons of the court in writing, as stated above, for their opinion in this case are in the words and figures following, to wit:

Opinion.

376 The first question which this case presents for our decision is whether the decree of the circuit court of Fauquier County made on the 13th day of September, 1867, has ever been reversed or annulled by any valid proceeding, & does not, therefore, still remain in full force.

In the first place it is contended that after the date of the said final decree & after the act of March 15th, 1867, reducing the period of limitation of appeals to two years, there elapsed two years before the record was delivered to the clerk of the appellate court, & before process issued upon the appeal & before such bond was given as was required to be given before the appeal could take effect. The date of the order made by W. Willoughby, as a judge of the late district court of appeals held at Fredericksburg, allowing an appeal from the said decree to the said district court, was May 17th, 1869, much less than two years after the date

of said decree. Process was issued upon the appeal on the 13th day of September, 1869, exactly two years after the date of said decree. The appeal-bond, however, was not given until the 11th day of November, 1869, more than two years after the date of said decree.

To this objection the answer made by the counsel of the appellee is sufficient; that the act of March 15th, 1867, which amended the
377 3d section of chap. 182 of the code of 1860, changing the limitation of time for presenting a petition for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order from five years to two years after it was rendered or made, did not amend the 26th section of that chapter, which allowed five years within which to perfect the appeal by giving bond, &c., and this stood unaltered until it was amended by act of June 23, 1870. (Acts of 1869-'70, p. 224, § 17.) So that the petition was presented & all other acts performed within the time allowed by law. But see Callaway vs. Harding, (23 Grattan, 542,) which will suffice.

If, however, the appeal had not been perfected within the period limited by law, still, as no objection was made on that ground until after the judgment was affirmed by the appellate court, it was certainly too late to make the objection then for the first time.

In the next place it is contended that even supposing the appeal which was allowed to have been perfected in due time, yet the appeal was invalid, & therefore the decree of the appellate court founded thereon is also invalid, & the said decree of the circuit court still remains in full force.

It is contended that the appeal was invalid because W. Wil-
378 loughby, by whom the same was allowed, as a judge of the late district court of appeals held at Fredericksburg was not in law or in fact such judge, & therefore had no authority to allow an appeal in the case.

If it be conceded that this would have been a good objection if made in due time, it might well be argued, as indeed was argued by the counsel for the appellee, that the objection came too late. It was not made in the district court of appeals while the case was pending there, nor in this court while the case was pending here, nor in the special court of appeals while the case was pending there until after that court had reversed the judgment of the circuit court, and then it was made for the first time.

But, without deciding that question, (because unnecessary to do so,) we are of opinion that the said appeal was a valid appeal according to the law of this State as it has been settled by this court in the cases of Griffin's exor. vs. Cunningham, (20 Gratt. 31,) & Quinn, &c., vs. The Commonwealth, (id.,138.) To that extent the judges were unanimous, although they differed upon an important question arising in the first-named case. All of the five judges were present when that case was argued & decided, & it was argued with great ability, & very deliberately
379 considered & decided. We all still think that that decision was right to the extent to which the whole court was then agreed, & we are of opinion that it ought not now to be disturbed. We therefore confirm it. In Teel, &c., vs. Young, &c., (23 Gratt., 691,) it was held that the act of March 5th, 1870, commonly called the enabling act, is a valid act, except the proviso which authorizes the court of appeals to review the decisions of the court of appeals organized under the reconstruction acts, & the district courts of appeal, sitting in December, 1869, had jurisdiction to hear & decide the causes then pending therein. Judge Christian, in his opinion in that case, after referring to the de-

cision of this court in Griffin's exor., vs. Cunningham, supra, said: "The question raised is therefore res adjudicata, & no longer open for discussion." Two of the other judges, Moncure & Staples, concurred in that opinion, & though the other two, Anderson & Bouldin, dissented, it does not appear that their dissent was to that part of the opinion.

In the next place it is contended that even if there was a valid appeal from the said decree of the circuit court of Fauquier County, that appeal has never been lawfully disposed of, but is yet pending in this court.

380 If it has been lawfully disposed of at all, it has been so disposed of by the late special court of appeals in reversing the said decree of the circuit court.

But it is contended that the decree of reversal of the circuit court is invalid, 1st, because the special court was not organized according to the constitution of the State; & if it was, 2dly, because the case was not legally transferred from this court to the special court to be disposed of by the latter; and—

1st. Was the special court organized according to the constitution? It is said that it was not, because it was made by law to consist of not more that three judges; whereas by the constitution it is required to to consist of not less than three nor more than five judges.

Certainly, if the constitution requires t to consist of not less than three nor more than five judges, the law which made it consist of not more than three was unconstitutional. And certainly, also, we may say it was competent for the convention in framing the constitution to authorize the legislature to create a special court of appeals to consist of not more than three judges.

The question is, Does the constitution confer such authority on
381 the legislature? If it does, it is an immaterial question whether a court of five would not have been better than a court of three judges, & whether it would not have been a sounder exercise of discretion in the legislature, in carring out the provision of the constitution on this subject, to have adopted the former instead of the latter number. We were decidedly of opinion that it would have been; but that is a question not for us but for the legislature to decide, supposing the constitutional authority to exist.

Now, the constitution seems to speak a plain language on the subject: "Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals & of the circuit courts, or any of them, to try any cases on the docket of said court in respect to which a majority of the judges thereof may be so situated as to make it improper for them to sit on the hearing of the same; & also to try any cases on the said docket which cannot be otherwise disposed of with convenient dispatch." A choice of the number of the judges of a special court of appeals was here plainly given by the constitution to the legislature, so that such number should be between the extreme limits of 3 &
382 5 inclusive. If there were any doubt about this upon section 3 of article vi of the constitution just quoted taken by itself, there can surely be none when we take it in connection with section 2 of the same article: "The supreme court of appeals shall consist of five judges, any three of whom may hold a court." If the convention had intended that special courts of appeals should consist necessarily of the same number of judges required by section 2 to constitute the supreme court of appeals, it would in the immediately succeeding section 3, have used similar language to that which was used in section 2,

& have said: "Special courts of appeals, to consist of five judges, any three of whom may hold a court, may be formed," &c. But the convention thought proper to give the legislature a discretion in regard to the number of the judges of which a special court may consist, between the limits of five & three; believing, no doubt, that while five might be a preferable number in some cases, three might be in others. The supreme court of appeals of the State has sometimes consisted of but three judges. It so consisted at one time before the State was divided as it now is; and it so consisted for several
383 years under the Alexandria constitution, after the State was divided. The first term of the court under that constitution was held by only two judges, during the sickness & after the death of Judge Thompson, & before the appointment & qualification of his successor, Judge Rives. That court of two judges went on to hear & decide the cases as they stood upon the docket without any objection so far as heard from any quarter. With this example immediately before the eyes of the convention when it framed the constitution, it may well have been led to suppose that three judges might be a sufficient number to compose a special court of appeals, which would be required only occasionally & perhaps for short periods; and economy, which was then a very important consideration, strongly recommended that the court should consist of three rather than five judges. At all events, it no doubt seemed to the convention to be reasonable to give to the legislature an election between the numbers 3 & 5 in the constitution of the court.

The legislature so construed the constitution, & accordingly passed the act approved February 28, 1872, entitled "An act to provide a special court of appeals." (Acts of 1871–'72. p. 98, chap. 124.)
384 That act unmistakably creates a court to consist of three judges & not more, & no person ever doubted, so far as we know, that the act was constitutional until it was recently doubted by counsel in this case. Nothing is better settled than that, prima facie, every act of the legislature is constitutional, & the burden of clearly showing the contrary devolves on him who asserts it. If the question be doubtful, it will be solved in favor of the validity of the act. If this act be not plainly in accordance with the constitution, it certainly cannot be said that the contrary plainly appears.

We do not see the force of the objection to the constitutionality of the act arising from the provision in section 2 of article vi of the constitution, concerning the supreme court of appeals, which declares "that the assent of the majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the Federal Constitution or to the constitution of this State." It was not contemplated nor intended that cases involving a question of constitutionality of a law should be referred for decision to a special court of appeals, which
385 must consist, in part at least & may consist entirely, as in the instance of the special court in question, of circuit court judges. In certifying cases to the special court for decision, of course the supreme court would certify none which was known to involve a constitutional question; and if a mistake should happen to be made in that respect, it could easily be corrected by returning the case to the supreme court or leaving it for decision by that court. A similar course, it is believed, was pursued whenever it was deemed proper, even before the passage of the act approved January 17, 1873. (Acts of 1872–'73, p. 26, chap. 39.)

Nor do we see the force of the objection made to the constitutionality of the act upon the ground that it authorized the court of appeals to designate annually three judges of the circuit courts to constitute a special court of appeals. We do not consider this as a legislative power which the court of appeals had no constitutional power to perform. This was no doubt deemed by the legislature to be the best & most convenient mode of mere designation of three of the circuit judges to hold the special court of appeals. A similar
385 mode has been authorized by law to be pursued in other like cases without objection. In the act providing for special courts of appeals, passed March 15th, 1832, sup. to R. C., p. 123, chap. 95, the duty of designating the judges to constitute a special court of appeals devolved on the general court. Certainly the general court had no more capacity to perform such a function than had the court of appeals. In the act passed February 25, 1854, acts of 1853–'4, p. 18, chap. 17, sect. 5, power was given to the court of appeals to designate judges of the circuit courts to hold a special court of appeals; precisely such a power as was conferred by the act of 1872.

Then the special court of appeals, created by that act, was organized according to the constitution, and we proceed now to enquire—

2dly. Was this case legally transferred from this court to the said special court to be disposed of by that court?

Under this head, we understand two objections to be made; first, that this is not such a case as ought to have been transferred to the special court; and, secondly, that no opportunity was afforded the appel-
387 lant to object to such transfer or show cause against it. We now proceed to consider these two objections; and, first, that this is not such a case as ought to have been transferred to the special court.

To determine this question, we must look to the words of the first section of the act & of the third section of the sixth article of the constitution; and we need only look to a few of those words. By the first section of the act the special court is constituted for the trial of such causes "as the court of appeals cannot dispose of with convenient dispatch, & shall certify to it, as provided in article sixth, section third, of the constitution of the State, not exceeding fifty at a time." And by the third section of the sixth article of the constitution, special courts are authorized to be formed "to try any cases on the docket of the supreme court of appeals which cannot be otherwise disposed of with convenient dispatch." This is all that is said either in the constitution or the act in regard to the nature of the cases to be tried by the special court in the exercise of the branch of its jurisdiction we are now considering. The only limitation, if limitation that can be called, upon the cases on the docket
388 which the special court is authorized to try is contained in the words "which cannot be otherwise disposed of with convenient dispatch." Now, what cases are they? Are they the first cases or the last cases on the docket, or those in the middle? The first have been longest pending, and in reason it would seem ought first to be tried. The last will not be tried for the longest time, & for that reason may seem to be those for the more speedy trial of which provision should be made. The cases in the middle of the docket having been longer pending than the first, & not so long as the last, may on that account be considered as entitled to preference in the transfers to be made to the special court. These words, "convenient dispatch," are very indefinite words, and they are relative words. What would be convenient dispatch in regard to one case would not be convenient dispatch in regard to another, although both might be disposed of in the same time. Take a case, for

example, that has been pending two years & another that has been pending two months. To dispose of the latter in one year might be convenient dispatch; whereas to dispose of the former in one year certainly would not be. Who is to decide these questions—to whom did the legislature & the framers of the constitution refer them? To whom
389 else than this court, which was reasonably supposed to have more information on the subject & to be better able to judge correctly in the matter than any other person? This court did exercise its best judgment in the matter under all the circumstances. The act provided that it should continue in force for two years, unless this court should enter an order of record that the existence of said special court was no longer necessary; thus showing that during that period of two years it was expected that all the cases on the docket which were necessary to be tried by a special court could be tried, & there would then be no longer occasion for such a court. If, however, there should be such occasion, the members of this court & all other persons concerned confidently expected that the special court would be continued until all occasion for it ceased. Thus it was confidently expected that this constitutional plan of reducing the overloaded docket of this court by the assistance of a special court would be actively & continuously pursued until the end in view was accomplished; which it was expected would be the case in two or three years, when it was hoped this court would be able to keep down its docket for the future. Under these
390 circumstances, it became our duty to execute the power conferred on us by the first section of the act of February 28, 1872, aforesaid, to certify for trial by the special court such causes on the docket of this court as could not be disposed of by this court with convenient dispatch. We had much difficulty in regard to the cases proper to be certified to the special court. We at length concluded that the fairest & best mode was to certify to it the first fifty unargued causes standing on the docket at the time of our adjournment in Richmond in the spring of 1872. The special court was to sit on or about the first of July thereafter. We were not again to sit in Richmond until some time in November, & would then be for some time occupied in the trial of criminal and other privileged causes; so that it might be some time in January before we could resume the trial of causes on the regular docket. During all this time the fifty oldest causes on the docket, which had already been delayed more than two years, would have been delayed many months longer but for our transferring them for trial to the special court, whereas by so transferring them, & by pursuing the same course thereafter, it was reasonably hoped that if the special court should be
391 continued so long as might be necessary, as was then expected, all the causes on the docket would be disposed of with as convenient dispatch as would be consistent with the rights of all parties concerned. We may have come to a wrong conclusion, but we acted according to the best of our judgment; and even if we made a mistake, it certainly cannot be such an error as invalidates the judgment of the special court

And now let us consider the objection—

Secondly. That no opportunity was afforded the appellant to object to such transfer or show cause against it.

The act of assembly made no provision for affording such an opportunity. It only provided for the transfer to the special court of such cases as this court could not dispose of with convenient dispatch, not exceeding fifty at a time. There could be no occasion for such an opportunity in regard to the question of convenient dispatch with which a cause might be disposed of. That was a question which the court could

decide without the aid of parties or their counsel. It could not have been contemplated by the framers either of the constitution or the
392 law that all or any of the suitors in the court might raise an issue on that question. There might be peculiar reasons for not certifying a particular case to the special court, such as the fact that a constitutional question existed in the case, or the fact that one of the judges of the special court decided the case as a circuit judge. But such facts, which would be cases of rare exception, might be brought to the notice of either court at any time; & the case, whenever proper, would be restored to the docket of this court. If there was any advantage to be derived from a trial of a case in one of the two courts rather than the other, the suitors in this court were all equally entitled to the benefit of that advantage. The importance of a cause afforded no sufficient reason for excluding it from the special court. That court was not instituted for the trial of inferior causes, but all causes on the docket, important or unimportant, which could not otherwise be disposed of with convenient dispatch. To be sure, the special court consisted of but three members, while this court consists of five, which may be supposed to give to those whose causes are tried in this court an advantage over those whose causes were tried in the special court; but that was an advantage, if any, which all had an equal chance to
393 obtain. In consequence of that supposed advantage, we would have preferred that the special court should also have consisted of five judges; but the legislature, to whom alone the decision of the question belonged, ordained otherwise. But this court is often held by only three judges, two of whom may decide the most important cause; & thus it may happen that the judgment therein may be reversed by two judges against two. That the appeal was taken to a court consisting of five judges is no sufficient reason for the case not being tried by a court which happens to be held by only three of the five judges. These are accidents to which all suitors are subject. We have seen that by changes in the constitutions & laws of the State, the number of the judges of this court has been sometimes five & sometimes three; and of whatever number the court happens to consist, it goes on to try the causes as they are called, without regard to the state of the court when the appeal was taken. Thus it has sometimes happened that an appeal taken to a court of three judges has been tried by a court of five, & so vice versa. After the close of the war, it happened that there was an overwhelming accumulation of business in this court. The evil
394 was so great that all concerned were anxious to devise an adequate remedy for its removal; and the act of February 28, 1872, to provide a special court of appeals, was passed for that purpose. The preamble of that act gives us some idea of the nature and extent of the evil. "Whereas it appears," says the preamble, "that the business of the court of appeals has increased so much by reason of the numerous questions to which the war has given rise that the causes upon its docket cannot be conveniently tried within a reasonable time," &c. This act is very different from the act of March 31, 1848, (Acts of 1847-'8, p. 51, chap. 68,) to which the learned counsel of the appellant seem to suppose it to be analagous, and we therefore think there was no occasion for using the same precautions in the act of 1872 as were used in the act of 1848. That act was passed under a constitution which made no provision for a special court of appeals, but which, on the contrary, declared that "the judicial power shall be vested in a supreme court of appeals in such superior courts as the legislature may from time to time ordain & establish, & the judges thereof, or the county courts, & in jus-

tices of the peace." It was argued that under that constitution
395 there could not be two courts of appeals. And in the preparation by the learned revisers of the code of the act of 1848, they had to use their skill to avoid leaving any room for reasonable objection to the act. And notwithstanding that a great controversy arose in regard to the act, which was settled in this court in the case of Sharpe v. Robertson, (5 Gratt., 518–644.) In the constitutions adopted since that decision was made the precaution has been used of avoiding a like difficulty by expressly providing for the creation of a special court of appeals, as in the constitution of 1851, the Alexandria constitution, & the present constitution. In the constitution of 1851, provision was made for the trial of all the causes on the docket of this court when that constitution took effect, so that it was plain what causes were to be tried by a special court under that constitution, & easy provision was made therefor by the act passed February 25, 1854, (Acts of 1853–'4, p. 18, chap. 17,) leaving this court to try the new causes afterwards brought to it. In the Alexandria constitution provision was made similar to but not the same with that contained in the present constitution. We have seen what that is. The act which was passed to carry that provision
396 into effect was not like the act of 1848, because the constitution under which it was enacted was very unlike the constitution under which the act of 1848 was passed. And if the act of 1872 was constitutional, as we think it was, of course the legislature had a right to pass it, & it is valid, although it does not contain the provisions of the act of 1848, however wise those provisions may be.

It follows from what we have said that the decree of the 27th of January, 1873, is a valid & conclusive decree; that there can be no complaint of any error either in it or behind it, and that, if there be any error in this case for which any relief can be afforded, it must be in the proceedings which occurred in the case after it was remanded by the special court of appeals to the circuit court. The appellant complains of such error, and we now proceed to consider that complaint.

Among the errors complained of in these subsequent proceedings are several which involve the same questions we have already considered & decided, and it will therefore be unnecessary to do more than to state them. That the decree of the special court of appeals is a valid & conclusive decree, as far as it goes in the case, is an answer to them all. The first of them is that the circuit court, on the 17th day of April, 1873, ordered the decree of the special court of appeals of the 27th day of January, 1873, in the case to be entered as the decree of the said circuit court, notwithstanding the resistance of such entry by the ap-
397 pellant, who insisted that the said decree of the special court was null & void for the reasons & upon the grounds set forth in his written objections filed & ordered to be made a part of the record in the cause. The second of them is that the circuit court, on the 17th day of December, 1873, rejected the prayer of the appellant's petition for a rehearing of the decree of said court, of the 17th of April, 1873, directing the decree of the special court of appeals of the 27th of January, 1873, to be entered as the decree of the said circuit court as aforesaid.

When the decree of the special court was entered as the decree of the circuit court as aforesaid, to wit, on the 17th of April, 1873, the latter court, in conformity with the requirements of the said decree of the former court, decreed that one of the master commissioners of the court should take an account, crediting the said Robert B. Bolling with the amount paid by him on the bills held by Caldwell, Shannon & Co. & charging him with the rents & profits of Bollingbrook & Ben Lomond from the

2d day of May, 1866, when possession thereof ought to have been delivered under the terms of the contract of sale in the bill & proceedings mentioned, & also with the value of the personal property which then ought to have been delivered under the terms of the said
398 contract; in taking which said account said commissioner was directed to make all necessary enquiries, & to report his proceedings to the court.

On the 28th of November, 1873, the report of the commissioner, & papers accompanying the same, were filed in the cause. It contained a statement of the account between Bolling & Lersner, as directed in said decree. "The only fact in the account," said the commissioner, "about which there was any difficulty was the question of the proper rent to be charged for said two tracts of land. There were seven depositions taken by each of the parties relative to this question; of course these fourteen witnesses differ as to the proper amount that should be charged, or as to what said farms should have rented for; the difference between the estimates of the highest & lowest being as much as that of $1,300. With this conflicting evidence your commissioner took the mean rent of all these estimates, to wit, $1,925 per annum for both farms; &, what is a little remarkable, the average rent of the two lowest & the two highest is within a few dollars of this sum fixed upon by your commissioner. The said Bolling was credited with all sums paid for taxes & for ditching & stone-fencing; these items were given in the exhibit filed with Townsend S. Bolling's deposition." Then follows the account
399 showing the total amount due by Bolling to Lersner on rent account up to 2d May, 1873, with interest to 2d December, 1873, to be $10,954.17, of which the sum of $9,160.83 is principal.

To this report eight exceptions were taken by Bolling, & none by Lersner; and on the 20th of December, 1873, the cause came on again to be heard on the papers formerly read, the said report of the commissioner, & exhibits returned therewith, & exceptions taken thereto, & was argued by counsel. On consideration whereof, the court overruled the 1st, 3d, 6th, & 7th of said exceptions; & being of opinion, upon the matters contained in the 4th & 5th of said exceptions, that there is no error in said report in failing to give the defendant credit directly for any increase in the intrinsic value of the lands, & that the true standard by which the rents & profits of the land should be determined is the annual value of said lands in the hands of a prudent & discreet tenant upon a judicious system of husbandry; but being further of opinion that the mode of treatment by the occupant should have some influence in determining this value, & that the amount allowed by said commissioner is more than a fair rent under the circumstances, which
400 the court ascertains upon a fair view of the testimony to be the sum of fifteen hundred dollars per annum, did overrule said fourth & fifth exceptions, in so far as they are inconsistent with the principles above declared, & did sustain them in so far as they are consistent therewith. And the court sustained the 8th exception, and recommitted the report to the commissioner with instructions to reform the same according to the principles of the said decree, & report the same forthwith to the court.

On the 23d of December, 1873, a report of the commissioner, made in pursuance of the said decree, was filed in the cause, showing the balance due by Bolling to Lersner, as of the 20th of December, 1873, to be $5,262.43, of which the sum of $4,684.19 is principal.

To this report six exceptions were taken by Bolling & none by Lersner. The said exceptions are as follows:

1. Because the commissioner charges the defendant with estimated & conjectural rents, &c., instead of the actual profits realized by defendant.

2. Because the com'r has failed to give Bolling credit for the
401 increased value of the land, arising from the mode in which he managed it.

3. Because the rent fixed is in excess of any fair estimate of value of the estate, based upon a proper management of it.

4. Because interest has been allowed upon estimated rents.

5, (called 7.) Because the com'r has not reduced the charge for the rent of 1866–'7 below that of other years, although that was the year when the fencing had to be repaired, & there was no capital to buy stock, & the tenancy began & ended at an unreasonable period for farming operations, to wit, the 2d of May, 1866, to 2d May, 1867.

6, (called 8.) Because the com'r failed to allow Bolling sufficient credit for his improvements & repairs over and above the general improvement of the land. (See exception 8 of 17th Dec'r, 1873.)

And on the same day, to wit, the 23d day of December, 1873, the cause coming on to be further heard on the papers formerly read, the comr.'s report last mentioned & the defendant's exceptions thereto, was argued by counsel, on consideration whereof the court, overruling
402 the said exceptions & confirming the said report, decreed that the defendant, Bolling, should execute & deliver to the plaintiff, Lersner, a good & sufficient deed in fee-simple, with general warranty, conveying to said plaintiff that tract or parcel of land known as Bollingbrook, in the bill & proceedings mentioned; and further decreed that the plaintiff should recover against the defendant the sum of $5,262.43, with interest on $4,684.19, part thereof, from the 20th of December, 1873, & the costs by him expended in the prosecution of this suit. And leave was reserved to the plaintiff to apply for further relief on the footing of the said decree.

From that decree an appeal to this court was applied for, which was accordingly allowed.

We have disposed of all the questions arising on this appeal, except those which relate to the account taken of rents & profits, and they are presented by the six exceptions of the appellant to the last report of the commissioner; all of which were overruled by the decree appealed from. We will now proceed to consider them, though not, perhaps, in the precise order of the exceptions.

It is well settled, & not denied in this case, that when a con-
403 tract is made for the sale of real estate, which a court of equity will specifically execute, from the moment of the contract the estate is to be considered as the property of the purchaser, & the purchase-money as the property of the vendor; possession of the former to be delivered and payment of the latter to be made according to the terms of the contract. If wrongfully such possession be retained by the vendor, or such payment be withheld by the vendee, contrary to the terms of the contract, the obligation hence arises to pay rents & profits in the one case, or interest in the other, as the case may be. In this case no question arises in regard to the obligation to pay interest, the purchase-money & interest having been all paid. But there is a question which is the main, & in substance & effect, almost the only remaining question in the case, in regard to the obligation to pay rents & profits. The vendor has continually retained possession of the estate, "from the 2d day of May, 1866, when possession thereof ought to have

been delivered under the terms of the contract," as adjudged by the decree of the special court of appeals, & yet retains such possession. His obligation to account for & pay rents & profits to some extent, supposing the contract to be valid & binding, as it has been adjudged to be, is not denied. The only question is as to the extent of such liabil-
404 ity & the rule by which it is to be ascertained. The appellant contends that he is bound to account for & pay only the amount of actual profits realized by him, while the appellee contends that the obligation is to pay "the annual value of said lands in the hands of a prudent & discreet tenant, upon a judicious system of husbandry;" "the mode of treatment by the occupant" having "some influence in determining this value," according to the decree of the circuit court of the 20th of December, 1873.

We are of opinion that the latter is the just & true measure of the appellant's liability, & the mode of ascertaining it, & therefore that the circuit court did not err in applying such measure & mode to this case, & in decreeing "that the amount allowed by said commissioner (to wit, nineteen hundred & twenty-five dollars per annum) is more than a fair rent under the circumstances; & in ascertaining such rent, "upon a fair view of the testimony to be the sum of fifteen hundred dollars per annum." At all events, we think the appellant has no just cause to complain of the amount of this assessment. There may be, & no doubt are, cases in which the amount of profits actually received, without regard to the actual yearly value of the property, is the just & true measure of liability. If a person were in possession of land which he bona
405 fide believed to be his, & did not know was claimed by another who might be adjudged to be entitled to it, there would seem to be reason in charging such person only with such profits as he actually received. But here the case is altogether different. A controversy arose between the parties very soon after the war about their contract, & as early as October, 1865, this suit was brought by Lersner for its specific execution. He claimed in his bill to have fully paid the purchase-money & to be entitled to the possesion of the land, which he said was wrongfully withheld from him. Bolling in his answer denied that Lersner was entitled to a specific execution of the contract, and claimed a re'cision thereof for reasons set forth by him. The litigation between the parties, thus commenced in 1865, was actively prosecuted by them until the 13th of September, 1867, when a decree was rendered by the circuit court annulling the contract, & for the payment by Bolling to Lersner of the sum of $19,708.90, with interest as therein mentioned, subject, however, to the provisions of the act of assembly staying the collection of debts; and also for the payment of the costs of suit by Lersner to Bolling. From the said decree an appeal was applied for on the 16th of April, 1869, allowed May 17th, 1869, & perfected by the execution of an appeal bond on the 11th of November, 1869. This
406 appeal was prosecuted without intermission until the 27th of January, 1873, when the special court of appeals being of opinion that there was error in the said decree of the circuit court in rescinding the contract of the 19th of January, 1863, & in not decreeing the specific execution thereof, therefore reversed the said decree with costs & remanded the cause to the circuit court with instructions to refer it to a commissioner to take certain accounts, & among them an account charging Bolling "with the rents & profits of Bollingbrook & Ben Lomond from the 2d day of May, 1866, when possession thereof ought to have been delivered under the terms of the contract."

Now, how can it be said, under all these circumstances, that Bolling is not chargeable with a fair & reasonable rent for the property from

& after the 2d day of May 1866, when, according to the decree of the special court of appeals, he ought to have delivered possession to Lersner under the terms of the contract. The fact is when we say that the decree of the special court of appeals is valid & conclusive, we decide every question of controversy in this case, even that which relates to rents & profits. In that view of the case it stands thus: On the 2d day of May, 1866, Bolling was in possession of the land in con-
407 troversy, & was bound by his contract to deliver it to Lersner, who had paid the whole amount of the purchase-money, & was then demanding such possession & actively prosecuting this suit for its recovery. Bolling has ever since remained, & yet remains, in the full possession & enjoyment of the land; while Lersner has ever since been demanding & actively prosecuting this suit to recover such possession, with the exception only of about two years, during which his application for an appeal from the decree of the circuit court of the 13th day of September, 1867, was suspended, and even during that period it must have been confidently expected by Bolling that Lersner intended to apply for an appeal, and that if he so applied, he would obtain it.

Under these circumstances ought not Bolling to have expected & prepared to pay a reasonable rent for the land in case of its recovery from him? And now that a decree has been rendered against him for it by the court of last resort, is there any principle of law or equity which can exempt him from liability for such a rent? We think not; and then the question is, what is a reasonable rent in such a case?

408 The commissioner ascertained that an average of the estimates of all the witnesses on both sides, of which there was an equal number, made the sum of $1,925, & reported that as a reasonable annual rent. But Bolling excepted, & the circuit court sustained his exception, & reduced the sum to $1,500 per annum, which it considered to be a reasonable rent, under all the circumstances of the case, & especially looking to the care which had been taken of the land & of the prudent manner in which it had been managed & cultivated. And from that amount of fifteen hundred dollars was deducted every cent which had been paid by Bolling for taxes on the land, for ditching, fencing, & other improvements, with the single exception of clover-seed & plaster used upon the land, which was considered to be properly chargeable to the tenant & not to the owner of the land. Is this more than a reasonable rent, & has Bolling any just cause to complain of it? We think not.

And this disposes of all the questions arising upon the exceptions to the commissioner's last report except the fourth, "because interest has been allowed upon estimated rents," which presents the only remaining question to be decided in the case.

409 In actions for the recovery of rent in arrear it was a general rule formerly that interest was not recoverable on the sum due because the landlord had a summary remedy by distress. (1 Rob. Pr., old ed., 362–'3, & cases cited.) But although interest was not given, of course, it might nevertheless be given under circumstances to be judged of by the jury, & in case of a general verdict allowing interest, it was intended that sufficient circumstances existed to justify an allowance thereof. (Id.) But this rule has been changed by an act passed March 2, 1827, which provides "that interest shall hereafter be allowed on rent in arrear from the period or periods at which the whole or any portion thereof shall become due." (Id.; acts of 1826–'7, p. 26, ch. 27, § 3.) Since the passage of this act there seems to be no difference between debts due for rent & debts due for any other valuable consideration, as

there certainly should not be. In the code, (p. 969, ch. 134, § 7,) the words of the law are, "In any action for rent, or for such use & occupation, interest shall be allowed as on other contracts." We know that in the United States the law favors the recovery of interest more
410 than in England, and, as a general rule here, where a debt is due, it will bear interest, which is an incident of the debt, & follows it as shadow does the substance; that rent is what is called "estimated," can make no reasonable difference. Rent must be estimated where the precise amount has not been fixed by agreement. But why may it not be estimated as the value of any other consideration may. (See Eppe's exor. v. Cole & wife, 4 H. & M., 161, & Sutton v. Mandeville, 1 Munf., 407.) The statute expressly provides that a landlord may by action recover "a reasonable satisfaction for the use & occupation of lands," & the same section of the statute provides, as above mentioned, that in any such action "interest shall be allowed as on other contracts." In this case a large portion of the rents was applied as they accrued to the payment of what was due to Bolling on account of the bills endorsed by him, & thus stopped interest. Of course there can be no objection to that, nor can there be any objection in reason or justice to an allowance of interest on the rents which afterwards accrued & remained in arrear.

Upon the whole, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

411 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record of the cause of Robert B. Bolling against Gustavus Lersner, lately decided by the said court.

In testimony whereof I hereto subscribe my name and annex the seal of the said supreme court of appeals at Richmond this 6th day of April, 1875.

[SEAL.] GEO. L. CHRISTIAN.

Fee for copy of record, $48.36; tax on seal of court, $1.00—$49.36.

412 To a justice of the Supreme Court of the United States:

The petition of Robert B. Bolling respectfully represents that in a suit in the highest court of the State of Virginia, wherein on an appeal from a decree made by the circuit court of Fauquier County in that State, your petitioner was appellant and Gustavus Lersner was appellee, there is drawn in question the validity of a statute of or an authority exercised under the State, on the ground of their being repugnant to the Constitution of the United States, and a title, right, privilege, or immunity is claimed under the said Constitution, to wit, under the first and tenth sections of the first article, and the fourth section of the fourth article of the said Constitution, and the fifth and tenth articles of the amendments to said Constitution, and the fourteenth amendment thereof, as appears by a transcript of the record in said suit, (p. 40 to 42; also p. 105 to 119; the printed document mentioned on p. 119 and following p. 127; the petition to the supreme court of appeals of Virginia, p. 11, and the opinion of that court.) And your petitioner shews that the final decree in said suit in the highest court of the State is in favour of the validity of said statute of or authority exercised under the State, and is against the title, right, privilege, or immunity specially set up or claimed by your petitioner under the Constitution: Where-

fore your petitioner prays for a writ of error, with a citation, (on taking good and sufficient security,) in order that the said final decree may be re-examined and reversed or affirmed in the Supreme Court of the United States.

April 26, 1875.

The petitioner above named by

CON. ROBINSON, *his Counsel.*

(Indorsed:) Bolling v. Lersner. Petition for writ of error. The decree, p. 124, is that which is affirmed by the supreme court of appeals.

Let the writ issue. Bond to be given in the sum of $15,000.

M. R. WAITE,
Chief-Justice, &c.

AP. 26, 1875

413 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Robert B. Bolling, appellant, vs. Gustavus Lersner, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the
414 United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or a commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Robert B. Bolling, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United Stares, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

(Indorsed:) Bolling v. Lersner, sups.

MAY 3d, 1875.—The within writ & a copy thereof, now filed in the clk.'s off. of the sup. court of appeals of Va., were lodged in said office on this day.

GEO. L. CHRISTIAN, *C.*

415 The United States of America to Gustavus Lersner, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Robert B. Bolling is plaintiff in error and you are defendant in error, to show cause, if any there be, why decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

M. R. WAITE,
Chief-Justice.

416 On this eighth day of May, in the year of our Lord one thousand eight hundred and seventy-five, personally appeared Douglas Tyler before me, the subscriber, Edward Nichols, U. S. com'r for the eastern district of Virginia, and makes oath that he delivered a true copy of the within citation to Gustavus Lersner, on this 8th day of May, at Leesburg, in said State, and at the same time exhibited to said Lersner the within citation.

Sworn to and subscribed the eighth day of May, A. D. 1875, before me,

EDWARD NICHOLS,
U. S. Com'r for the Eastern District of Virginia.

417 Know all men by these presents that we, Robert B. Bolling, George W. Bolling, and Townshend S. Bolling, are held and firmly bound unto Gustavus Lersner in the full and just sum of fifteen thousand dollars, to be paid to the said Gustavus Lersner, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a supreme court of appeals of Virginia, held on Thursday, the twenty-fifth day of March, 1875, in a suit depending in said court between Robert B. Bolling, appellant, and Gustavus Lersner, appellee, a decree was rendered against the said Robert B. Bolling, and the said Robert B. Bolling having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Gustavus Lersner, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Robert B. Bolling shall prosecute his writ of error to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) ROBT. B. BOLLING. [L. S.]
" GEO. W. BOLLING. [L. S.]
" T. S. BOLLING. [L. S.]

Sealed and delivered in presence of—
G. S. ARMISTEAD.
JNO. ROWLETT.
N. M. TANNER.
GEO. W. GOODWYN.
ROBT. A. MARTIN.

Approved by

M. F. PLEASANTS,
Clerk U. S. Circuit Court, E. Dist. Va.

(Indorsed:)
Approved:
(Signed)

M. R. WAITE,
Chief-Justice Sup. Ct. U. S.

The original of the within bond was filed in the cl'k's office of the supreme court of appeals of Va., May 3, 1875.

GEO. L. CHRISTIAN, *C.*

(Indorsement on cover:) No. 658. Robert B. Bolling, plaintiff in error, vs. Gustavus Lersner. Virginia, sup. ct. of appeals. Filed 9th October, 1875.

Supreme Court of the United States.

No. 658.

ROBERT B. BOLLING, Plaintiff in Error,

vs.

GUSTAVUS LERSNER.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

ARGUMENT OF

JAS. V. BROOKE, of Counsel for Deft. in Error,

IN SUPPORT OF MOTION TO DISMISS.

Jos. L. Pearson, Printer, 9th and D streets, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 658.

ROBERT B. BOLLING

vs.

GUSTAVUS LERSNER.

Writ of error to the Supreme Court of Appeals of Virginia.

MOTION BY DEFENDANT TO DISMISS.

On behalf of the defendant in error we respectfully move to dismiss for want of jurisdiction.

The case is this:

Gustavus Lersner, (defendant in error,) in the year 1865, instituted a suit in chancery in the Circuit Court of Fauquier county, Virginia, against Robert B. Bolling, (plaintiff in error,) its object being to enforce specific performance of a contract for the sale of certain real estate purchased by Lersner from Bolling in the year 1863. The bill alleged the contract of sale, the payment of the purchase money, and the right of Lersner to a conveyance and delivery of possession. The answer of Bolling, admitting the contract, denied the claim asserted, on the ground of an alleged failure to pay the purchase money, and fraud.

The Circuit Court of Fauquier County refused specific performance, but gave Lersner a decree for the value of

the purchase money, so far as it held it to have been paid. From this decree Lersner took an appeal, which then lay to the District Court of Appeals of Virginia, a tribunal intermediate between the Circuit Court and the Supreme Court of Appeals, but which ceased to exist at the change of the State constitution in 1869, the causes then pending on its docket being transferred to the Supreme Court of Appeals, according to law.—(See Sess. Acts, 1869–70, p. 22.) The appeal was awarded by Judge Willoughby, one of the judges of the existing Court of Appeals of Virginia, on the 17th day of May, 1869.

This appeal pended in the District Court of Appeals until it was so transferred, and after its transfer pended in the Supreme Court of Appeals until the 19th day of April, 1872, when, by order of the court, it was certified to the Special Court of Appeals, a tribunal of last resort, authorized by the new constitution and established by act of assembly passed 28th February, 1872.—(Sess. Acts, 1871–2, pp. 98–9.) It was argued in that court elaborately in July, 1872, the court suspending its decision until the 27th day of January, 1873. During this interval occurred the EX-PARTE correspondence found in the record.—(Top p. 85–92, inclusive.) The decree of the Special Court of Appeals reversed the decision of the Circuit Court, decided that Lersner was entitled to a specific execution of the contract, and remanded the cause to the Circuit Court for an account of rents, profits, &c.—(Rec., top 29–30.) This was more than *two years* before the writ of error was awarded in this case. A petition for a rehearing was presented by Bolling in the Special Court of Appeals and refused, (Rec., top 94–5, and pet. p. 6,) and the cause was certified to the Circuit Court according to the law of the state, which provides that—

"*The court from which any cause may have come to the 'Court of Appeals shall enter the decision of the appellate court 'as its own, and execution may issue thereon accordingly. If 'such decision be received by the clerk of the court below in va-*

'cation, he shall enter it of record in his order book, and there-'upon such execution may issue, and such proceedings be had 'in the case as would have been proper if the decision had been 'entered in court."—(Code of Va., ed. 1873, p. 1143.)

This decree coming down to the Circuit Court in term time, Bolling appeared by counsel and resisted its entry, filing objections which are found in record.—(Top. 31–2.) The Circuit Court, however, ordered the decree to be entered, and directed the enquiries which it prescribed. Upon the coming in of the report of the master, Bolling filed exceptions thereto, and also a petition for rehearing of the order of entry, (Rec., top p. 83–95,) on consideration whereof the court, "*being of opinion that the said rehearing could not be properly granted,*" refused the same. The Circuit Court thereupon proceeded with the case, and a decree finally disposing of all matters not closed by the decree of the Special Court of Appeals was entered on the 23d December, 1873.—(Rec., top p. 99.)

From this decree Bolling appealed to the Supreme Court of Appeals, in which the appeal was fully heard on the 28th January, 1875, and which entered its decree on the 25th day of March, 1875, affirming the decision of the court below.—(Rec., top 265.) It is to this decision that the writ of error has been awarded from this court.

The petition in this cause is couched in terms so general (if not *ambiguous*) that it is difficult to determine the exact grounds upon which it rests, even though reinforced by references to various parts of the record, and to some documents which we respectfully submit are no parts of the record. Such a document is described as "*the printed document mentioned on page* 119, *and following page* 127," (Rec., top 100–119,) and which comprises an argument made before the Circuit Court by counsel for plaintiff in error after the cause was remanded. It is true the clerk of the court certifies (Rec., top 95,) that this document was filed with the petition for rehearing in the Circuit Court, (Rec., top 83,) but this does not consti-

tute it a part of the record, nor was it ordered to be made such, or even noticed in the petition itself amongst the other documents, leave to file which was asked.—(Rec., top 83; see *Fisher* vs. *Cockerill*, 5 *Pet.*, 248; *Reed* vs. *Marsh*, 12 *Id.*, 153.) And though the strict rule laid down in *Rector* vs. *Ashley*, 6 *Wall.*, 142, and other cases, has been relaxed so far as to allow the certified opinions of *State courts* to be looked to as part of the record, (*Murdock* vs. *City of Memphis*, 20 *Wall.*, 633,) no such privilege has been accorded to the *opinions of counsel*, however learned, and the argument of counsel, filed as it is in this cause in the absence of such full and satisfactory replies to it as might be made if necessary, should be regarded as so much waste paper. No rule of practice warrants its presence in the record.

The writ of error must stand or fall, according to the support which it finds or fails to find in the act of Congress of February 5, 1867, standing in the place of the 25th section of the Judiciary Act of 1789.—(Rev. Stat., § 709.) In subjecting it to this test this court will look carefully into the record and withhold its action, unless it shall find that the alleged grounds of its jurisdiction are real and substantial, and not fictitious and illusory. In "*Ocean Ins. Co.* vs. *Polleys*," 13 *Pet.*, 157, Judge Story says: "*In the exercise of 'the appellate jurisdiction of this court over the decisions of 'state courts, we are not at liberty to resort to forced inferences 'or conjectured reasonings, or possible or even probable sugges- 'tions of the points raised and actually decided by those courts. 'We must see plainly that the decision was either directly made 'of some matter within the purview of the 25th section of the act 'of* 1789, *or that the decision could not have been what it was 'without necessarily involving such matter.*" The reports of this court present many cases in which writs of error have been dismissed upon the ground that no federal question was *really* raised and decided, and the frequency of such cases justified the admonition administered by

the Chief Justice in "*Hurley* vs. *Street*," 14 *Wall.*, 86, as well as the forcible illustration found in *Murdock* vs. *City of Memphis, ub. sup., pp.* 628–9. We apprehend that this is a case in which the plea of "*deputy marshal*" finds its counterpart.

The petition seems to rest on two grounds:

1. That in the suit in the Supreme Court of Appeals of Virginia, being the highest court of the State, there was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of their being repugnant to the Constitution of the United States, and that the final decree of said court was in favor of said statute and authority.

2. That there was a title, right, privilege, or immunity claimed under said Constitution and its amendments in said suit, and that the decision of the court was against such right, title, privilege, or immunity.

We are referred to the 1st and 10th sections of the 1st article, and the 4th section of the 4th article, and the 5th, 10th, and 14th amendments of the Constitution, as containing the provisions under which the title, right, privilege, or immunity was claimed. *We are fortunate in not having to review the whole instrument.*

The act of February 5th, 1867, was fully considered in "*Murdock vs. City of Memphis*," and the following propositions seem to be well established by that case:

1. "*That it is essential to the jurisdiction of this court 'over the judgment of a State court, that it shall appear 'that one of the questions mentioned in the act must have 'been raised and presented in the State court.*"

2. "*That it must have been decided by the State court, 'or that its decision was necessary to the judgment or decree 'rendered in the case.*"

3. "*That the decision must have been against the right 'claimed or asserted by the plaintiff in error under the 'Constitution, treaties, laws, or authority of the United 'States.*"

What is the meaning of the terms "*raised and presented*" as used by the court in that case? Must not the Federal question be so "*raised and presented*" as to make it the subject of adjudication in the State court? Does a party bring himself within the rule who rests quietly in the State court until the suit has so far progressed that all the *substantial* merits have been finally passed upon by a decree, which can neither be annulled or modified under the forms of the State law, and then thrusts in a Federal question for the first time?

Such a theory would come within the criticism of Justice Story ("*The Santa Maria*," 10 *Wheat.*, 443): "*The 'party might lie by through the whole progress of the original 'cause until the final decree, holding the real owner out of his 'property and securely enjoying the profits, and then start new 'claims for future investigation which would protract the final 'decision to an indefinite period. Such a course would have a 'tendency to bring into disrepute the administration of justice, 'fc.*"

We apprehend that it was the intention of the act of Congress that the constitutionality of the State law or of the authority under the State should be "drawn in question" *regularly*, and that when this court speaks of the question being "*raised and presented*," it means that it should arise *according to the forms of judicial procedure in the State court.* For instance, a party submitting to a trial upon questions of fact, and after verdict offering to file a demurrer, would hardly be considered as having "*raised and presented*" the question at all. The answer would be, "the time has passed when such matter can be acted upon by the court."

If such be the true construction, (and it seems too well grounded in reason to be questioned,) then we respectfully submit that no Federal question was ever "*raised and presented*" in the State court.

It will not be pretended that the shadow of such a question can be found in the original suit, or that it was

ever suggested while the first appeal was pending, either in the District Court of Appeals or in the Supreme Court of Appeals or in the Special Court of Appeals. It was only after the substantial merits of the controversy had been finally adjudicated by the last-named court, upon full argument, (in which counsel for plaintiff in error largely participated,) and after its decree had been certified to the inferior court for entry, that any allusion is made to such an instrument as the *Constitution of the United States*. This fact is strongly commented on by the Supreme Court of Appeals in its opinion.

Even if the petition for a rehearing in the Special Court of Appeals had raised any Federal question, (which it did not,) no ground would exist for a writ of error from this court. In "*Steines vs. Franklin City R. R.*," 14 Wall., 21–2, the court says: "*Necessary jurisdictional allegations cannot 'properly be introduced for the first time on a motion for a re-'hearing, as the motion itself is one addressed to the discretion of 'the court, and one in which the decision of the court in grant-'ing or refusing it is not subject to review in an appellate court.*" How much stronger the case when the court has no such discretion, but is bound to regard the decision made as utterly beyond its control!

As early as 1804, it was held by the Court of Appeals of Virginia, that the court below could not modify the decree of the appellate court; Judge Tucker, saying: "*I cannot conceive of anything more inconvenient to society 'than a power in the courts below to reverse and alter the 'solemn judgment of the supreme tribunal, as controversies 'would then be perpetual, and suits become interminable.*"—(*Price vs. Campbell*, 5 *Call.*, 115.) The state law upon the subject is mandatory in its terms. It provides that the court below *shall* enter the decision of the appellate court; that if the court be not in session, the clerk shall enter it of record in his order book, and that execution shall issue accordingly.—(Code of Va., edit. 1873, p. 1143.)

In "*Skillern's Ex'ors vs. May's Ex'ors*," 4 *Cr.*, 136, the

court below was not allowed to alter the decision of this court, although after the cause had been remanded for further proceedings to be had therein, it was discovered that it was not a cause within the jurisdiction of the court below. And in "*Sibbald vs. U. S.*," 12 *Pet.*, 492, this court court says: "*When the supreme court have executed their 'power in a cause before them, and their final decree or judg- 'ment requires some further act to be done, it cannot issue an 'execution, but shall send a special mandate to the court below 'to award it. Whatever was before the court and disposed of 'is considered as finally settled. The inferior court is bound by 'the decree as the law of the case and must carry it into exe- 'cution according to the mandate. They cannot vary it or 'examine it for any other purpose than execution, or give any 'other or further relief, or review it upon any matter decided 'on appeal for error apparent, or intermeddle with it further 'than to settle so much as has been remanded. After a mandate 'no rehearing will be granted.*"

The decree of the Special Court of Appeals was *final, conclusive,* and *irreversible.* Such was the result of the established judicial polity of the state. Neither the Circuit Court of Fauquier nor the Supreme Court of Appeals itself could interfere with it. The Court of Appeals, in deciding this case, declares "*that the decree of the Special Court 'of Appeals is a valid and conclusive decree; that there can 'be no complaint of any error either in it or behind it, and 'that if there be any error in the case for which any relief 'can be afforded, it must be in the proceedings which occurred in 'the case after it was remanded by the Special Court of Appeals 'to the Circuit Court.*"—(Rec., top p., 272.) *And that this is a sufficient answer as well to allegations of error as to complaints against the action of the Circuit Court.* It thus reaffirms the established rule and virtually overrules *Robinson's Prac., vol. 7, ch. 1, § 16, p. 124, published during the pendency of this suit, and cited by its learned author with approbation,* on page 10 of the record, though reinforced by *Appendix A* of said volume, p. 1041.

When, therefore, Bolling appeared in the Circuit Court of Fauquier to resist the entry of the "*final and conclusive*" *decree* of the appellate court, he really no more "*raised and presented*" a question in legal contemplation than if he had done the same thing before the *clerk in his office*. He came upon the stage when the play was ended. His proceeding was nugatory. It was contrary to the letter of the statute, to the fixed rules of the judicial system, and to the all-important maxim of the law, "*vigilantibus non dormientibus leges subveniunt.*"

Nor did the case stand in any better attitude for Bolling when it came before the Supreme Court of Appeals on the second appeal. On that appeal nothing could come up but the matters for the adjustment of which the cause had been remanded. So says the Supreme Court of Appeals in its opinion in this case, and its decision finds support in "*Sibbald vs. U. S.*," *ub. sup.*, 492; in "*Browder vs. McArthur*," 7 *Wheat.*, 58, and in "*Roberts vs. Cooper*," 20 *How.*, 481. In the last of these cases the court says: "*It has been settled by the decision of this 'court, that after a case has been brought here and decided, 'and a mandate issued to the court below, if a second writ of 'error is sued out, it brings up for revision nothing but the 'proceedings subsequent to the mandate. None of the ques- 'tions which were before the court on the first writ of error 'can be re-heard or examined upon the second. To allow a 'second writ of error or appeal to a court of last resort 'on the same questions* WHICH WERE OPEN TO DISPUTE *on 'the first, would lead to endless litigation.*" In "*Griffin's 'Ex'r vs. Cunningham*, 20 *Grat.*, 50, Judge Christian says: "*It is now the well settled law of this state, that the court of 'appeals cannot review the decision rendered at a former term. 'After its term has closed, its adjudications, right or wrong, 'must stand irreversible and final, and the controversies between 'the parties whose rights have been adjudicated are closed for- 'ever.*"

We, therefore, respectfully submit, that in the light of

the principles to which we have adverted, there was no Federal question "*raised and presented*" in the suit, because not so raised and presented, *as to be acted on.*

But again, admitting that the questions were raised and presented, were they such as are contemplated by the act of 1867? There is not such precision in the petition as the court enjoins in 18 How., 196, but it contains references to parts of the record by way of elucidation. They are the objections filed in the circuit court (Rec., top p. 31–32,) the petition for rehearing in said court (Rec., top p. 83–4), and the petition for the last appeal (Rec., top p. 1–25).

An analysis of these documents will show that, for the greater part, they relate to the construction of the *State* constitution, the validity of acts of the State legislature under said constitution, and the regularity of the action of *State* courts in enforcing said laws. It will hardly be contended that such questions as these can furnish any ground for writ of error. The settled doctrine is, that in construing either the constitution or statutes of a State, so far as they relate to the local law, this court will look to the decisions of the highest court of the State and adopt its construction. The authorities on this point are too numerous for citation, but amongst them are the following: 9 Cr., 98; 2 Pet., 85; 3 Pet., 289; 8 Pet., 109; 6 Pet., 297 and seq.; 11 Wheat., 367 and seq.; 7 Howard, 818; 18 How., 196, and Withers vs. Buckley, 20 How., 88–9, where the court says: "*Nor has it been deemed* '*the province of this court to abrogate or overrule the interpre-*' *tation put upon their own statutes by the courts of the several* '*states, whether such interpretation had reference to the ordi-*' *nary rights of property, or to the nature and extent of the* '*legislative powers vested by the constitution of the several States* '*and their coincidence with acts of legislation performed under* '*the delegation of those powers.*"

And this court has expressly declared "that the au-' thority conferred on a court to hear and determine

'cases in a state, is not the kind of authority referred to 'in the 25th section, otherwise every judgment of the 'supreme court of a state would be re-examinable under 'this section." (*Bethell vs. Demaret*, 10 *Wall.*, 537.) Thus disposing of any objection made to the jurisdiction conferred by state law on the Special Court of Appeals.

Outside of these matters, exclusively within State control, the questions "*raised and presented*" (or which may be claimed to have been) consist of a denial of the authority of *Judge Willoughby* to grant the original appeal, and of the legality of the act of the Virginia legislature, known as the "*enabling act.*"

It is true that in the State court, after the "*final decree*," the plaintiff in error did assail the constitutionality of the reconstruction acts, by virtue of which, and of appointment under them, Judge Willoughby held office as one of the judges of the Court of Appeals of Virginia. But in his petition here he ignores the first clause of the Judiciary Act of 1867, and does not seek to bring his case within the provision which contemplates the contingency of a state court holding an act of Congress to be unconstitutional. Apart from the fact that there was no such action by the State court in this case, there was another reason, grounded in the very substance and object of the law, why such a position taken by him in the State court could not furnish the foundation for a writ of error. The reason is this: If, *upon his motion*, the State court had declared the reconstruction acts unconstitutional, he could not stand in this court, for the decision would have been *in his favor*. If, on the other hand, the court had sustained said acts as constitutional, he would have been equally remediless, for the decison would have been *for* and *not against* the constitutionality of the acts. In either case, therefore, his "raising and presenting" this question could not procure him a "*locus standi*" in this court. From this it must be manifiest that in a case where an act of Congress is "drawn in question" in a State court,

(within the meaning of the act of 1867,) it must be in such form that, according to the provisions of the act, a writ of error will lie. It must be a question which, if decided against the party raising it, a resort may be had to the federal tribunal. Otherwise it is not such a federal question as gives jurisdiction here.

Doubtless seeing this difficulty in his way, the plaintiff in error diverges from the line of direct attack and substitutes the "*enabling act*," a State law, as embodying the requisite elements to constitute objections to it, a "*federal question.*" It will be apparent, upon an examination of said act, that, in thus shifting his line of attack, the plaintiff in error must meet the same difficulties as if his assault had been upon the reconstruction acts of Congress. In avoiding *Scylla* he encountered *Charybdis.*

The enabling act was passed by the General Assembly of Virginia on the 5th day of March, 1870.—(Sess. Acts, 1869–70, ch. 18, p. 16.) Reciting in its preamble that grave doubts had arisen as to the right of the civil officers of the Commonwealth (except the governor, lieutenant-governor, attorney-general, and members of the general assembly) "to *continue to hold* their offices and to 'exercise the powers, perform the duties, and enjoy the 'privileges and emoluments appertaining to the same, 'and as to the legality of their acts as such officers *since* 'the admission of the State as one of the co-equal States of the 'American Union," (the date of which is fixed as the 26th January, 1870,) the act declares that all *such officers*, who are eligible to office under the existing constitution and laws of Virginia, and who qualified on or before the 26th January, 1870, and none others, are recognized as legal officers of the Commonwealth, and authorized to continue to hold their offices. The second section provides that "all official acts heretofore done by any such 'officers, and otherwise lawful, are hereby declared as 'legal and binding as if they had been done by officers 'duly elected and qualified under the constitution of this

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'*to said supreme court may seem right and proper,*" &c.

The statute would appear to have relation only to acts done by officers holding office under the reconstruction acts and military appointment, *after the restoration of civil authority in the state*, and (if this be the true construction) would have no bearing upon the official act of Judge Willoughby done on the 17th May, 1869, and, therefore, an objection to it, as confirmatory of Willoughby's action, would raise no "*federal question.*" This is the construction which one of the judges asserts in "*Griffin's Exrs* vs. *Cunningham*," 20 *Grat.*, 123, where he says, that in the passage of that act "*the legislature did not think it necessary to confirm what was done under that government*," *i. e.*, under the government established under the reconstruction laws—its validity being unquestioned.

An analysis of the opinions of the judges in *Griffin* vs. *Cunningham* will show that the authority of the military Court of Appeals, (as it is termed,) prior to the 26th January, 1870, was unquestioned, and that it was clearly supported, *apart from any legislative action*, by the established doctrines relating to a government *de facto*, so that neither the constitutionality of the reconstruction acts, or of the enabling act, was necessarily involved, or in fact adjudicated; and the case of "*Klinger* vs. *State of Missouri*," 13 *Wall.*, 257, becomes not only pertinent but conclusive.—(See also *Railroad Co.* vs. *Rock*, 4 *Wall.*, 177; *Kennebeck R. R.* vs. *Portland R. R.*, 14 *Wall.*, 23.)

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But if the constitutionality of these acts was adjudicated, and if the decision was in favor of the constitutionality of both, and if the decision in "*Bolling* vs. *Lersner*"

* As to extent of doctrine on this subject — See State v Candle — 38 Conn: 449.

had rested on the same grounds, would this give the plaintiff in error a footing here? Certainly the decision in favor of the *constitutionality of the reconstruction acts* would not; and this being true, the enabling statute, merely affirming or confirming the authority exercised under those acts, would furnish no better ground. The judiciary act could never have intended to prohibit the Federal court from overriding the decision of a State court in favor of an *act of Congress*, and at the same time confer that power with regard to a decision of a State court in favor of a *State law confirmatory of the authority conferred by such act of Congress.*

And so we say no such question as is contemplated by the 25th section of the judiciary act and the act of 1867 was ever really raised and presented in the State court.

But lastly—

If it be true that no such Federal question as is contemplated by the judiciary act was ever "raised and presented," it follows, as a necessary consequence, that it was never *decided.* Certainly neither in the decree of Fauquier Circuit Court nor in the decree of the Special Court of Appeals, nor in the decree of the Circuit Court, after the case was remanded for an account, was any such question passed upon; and upon an inspection of the opinion of the Supreme Court of Appeals, upon the second appeal, it will be found that no such question entered into the consideration upon which its decree was based. It is true, the court refers to the question of the constitutionality of Judge Willoughby's action, and declares that it was valid according to the law of the state as settled in "Griffin vs. Cunningham, and that case affirmed its validity, not principally, if at all, upon either the reconstruction acts or the enabling act, but upon grounds distinct therefrom. The court says, further, "*if it be conceded that this*" (Willoughby's lack of lawful authority) "*would have been a good 'objection, if made in due time, it might well be argued, as in-'deed was argued by the counsel for the appellee, that the objec-*

'*tion came too late. It was not made in the District Court of* '*Appeals, while the case was pending there; nor in this court,* '*while the case was pending here; nor in the Special Court of* '*Appeals, while the case was pending there, until after that court* '*had reversed the judgment of the circuit court, and then it was* '*made for the first time.*"

The residue of the opinion of the Supreme Court of Appeals relates to questions which exclusively pertain to the legality of State tribunals and their proceedings, and to the matters of controversy subsequent to the decision of the Special Court of Appeals; which, as to all other matters, it declares to be final, conclusive, and irreversible.

The plaintiff in error complains that through the operations of the State tribunals, the rights guaranteed to him by the 5th and 14th amendments to the Constitution have been invaded, in that his property is taken "*without due process of law.*" So far as the 5th amendment is concerned, it has always been held to be a restriction upon the legislation of Congress, and not upon the States.—(Withers vs. Buckly, 20 H., 90.) The 14th amendment, it is true, contains a similar provision as to the States, which has been commented upon by this court in "*The Slaughter-house Cases,*" 16 Wall., 80. The term "due process of law" has been held to mean nothing more nor less than "the law of the land." The latter words, "*per legem terræ,*" (says Lord Coke,) are held to be synonymous with the former.—(2 *Inst.*, 50–1; *Story Const.*, § 1789; 2 *Kent*, 13; *Mayo vs. Wilson*, 1 *N. H. R.*, 55; 1 *Curt.*, 311.) Mr. Webster, in the *Dartmouth College Case*, says: "By the '*law of the land,*' is most clearly intended the general law 'which hears before it condemns, which proceeds upon 'enquiry and renders judgment only after trial. The 'meaning is that every citizen shall hold his life, liberty, 'and property, under the protection of general rules which 'govern society." Sedgwick adopts this as a satisfactory definition.—(*Sed. Con. and Stat. Law*, 475.) And in "*Westerville vs. Gregg*, 12 *N. Y.*, 209, Justice Edwards says:

"Due process of law, undoubtedly means in the due 'course of legal proceedings, according to those rules 'and forms which have been established for the protec- 'tion of private rights. * * Due process of law means 'the same as 'law of the land,' namely, that laws shall 'be general in their operation, and affecting all alike."—(*Sears vs. Cottrell*, 5 Mich., 257.) It is difficult to conceive, in the light of these and other definitions, on what ground the plaintiff in error can claim that he has been subjected to any risk of being deprived of either life, liberty, or property, "without due process of law," while the record shows that, availing himself of these "rules and forms, established for the protection of private rights," he has entered without obstruction almost every court and voluntarily submitted his cause to be determined according to laws governing all alike.

And equally difficult is it to discover what is the "title, right, privilege, or immunity," the denial of which is claimed to give the plaintiff in error a footing here. This court will search in vain the record brought up for its inspection for any such ground of jurisdiction. The picture which it presents is simply that of an obstinate and protracted resistance upon the part of the plaintiff in error to a claim adjudicated by the highest State tribunal to be just and equitable, with full opportunity of availing himself of every defence during its progress, and without objection to the authority of any court in which it has been litigated until after its final decision. "*Only this, and nothing more.*"

It has been our aim to confine this argument within the narrow limits assigned by the question of jurisdiction, without entering into a discussion of the correctness of the decision of the court below, although, in our judgment, indisputable. We think we have shown—

1. *That no Federal question was raised and presented in the State court.*

(*a*) Because no question savoring of that character was ever presented at such a time or in such form as the judicial system of the State allowed it to be presented, which is equivalent to its non-presentation.

(*b*) Because the questions claimed to be Federal, were not such within the spirit and meaning of the law.

2. *That no Federal question was either necessarily involved nor in point of fact decided.*

3. *That the allegations of the petition touching "due process of law,"* and the invasion of "*titles, rights, privileges, and immunities,*" are creations of professional fancy, having no substantial existence in the facts shown by the record.

If we have succeeded in our effort, the dismission of the writ of error awarded in this case must follow as a necessary consequence; and the tedious litigation, which, having run its course through the whole series of the State courts, has sought to prolong its existence in this tribunal, will receive its final quietus.

JAMES V. BROOKÉ,
OF BROOKE & SCOTT,
Of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

No. 658.

BOLLING
vs.
LERSNER.

Motion to Dismiss.

Argument of J. R. Tucker, for Deft. in Error.

Jos. L. Pearson, Printer, 9th and D streets, Washington, D. C.

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vs.
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Argument of J. R. Tucker for Defendant in Error.

The case is this:

The Circuit Court of Fauquier rendered a decree, September 13, 1867.—(Rec., 264.) From that decrée Lersner prayed an appeal to the District Court of Appeals.—(Rec., 119.) It was allowed by W. Willoughby, judge, May 17, 1869.—(Rec., 125.)

That case, after the new constitution was adopted, was tried by a Special Court of Appeals, which reversed the decree of the Circuit Court of Fauquier, (Rec., 29, 30,) and the Circuit Court thereupon entered the decree of the Appellate Court, April 17, 1873, (Rec., 29, 30,) notwithstanding the objections entered by the appellant.

The first of these objections comprehends the ground of this appeal.

The facts stated in that objection are nowhere sustained by evidence, nor were they admitted by the appellee. They were not averred in any pleading, but are really merely in the form of argument. The objection was never taken in the Special Court of Appeals,

nor in the District Court, as appears in the opinion of the court, which is part of the decree appealed from.—(Rec., 266.)

All the other objections to the entry of the decree of the Special Court of Appeals by the Circuit Court of Fauquier relate to the constitution and laws of the State of Virginia, which, having been overruled in the decree now appealed from, are not subject to review by this court.

The only question, therefore, is, whether the allegation that Judge Willoughby had no authority to grant the appeal vitiates the whole action of the Special Court of Appeals, and invalidates the decree of the Court of Appeals of March 25, 1875.

The appellant complains of the decree of the Court of Appeals of Virginia of March 25, 1875.—(Rec., 265, et seq.)

That decree, in itself, did not depend upon the validity of the act of Judge Willoughby granting an appeal to the District Court of Appeals, in May, 1869. It only declined to invalidate and reopen a decree of the Special Court of Appeals, January 27, 1873, upon the case before it on an appeal granted by Judge Willoughby, in May, 1869. The vice, if any exists, is in the grant of the appeal by Judge Willoughby, upon which the Special Court of Appeals made its decree.

The Court of Appeals, in the decree appealed from now, has declared that, by the general and statute law of Virginia, the decree of January 27, 1873, rendered by the Special Court of Appeals, "is a valid and conclusive decree; that there can be no complaint of any error either in it or behind it."—(Rec., 272.)

Can this court reverse this last decree, which does not decide the case before it on the *sole* ground of the legal validity of Judge Willoughby's act, but does decide it upon the ground that the objection, not having been taken in time, and *pendente lite*, cannot be "raised and

presented" *post litem adjudicatam*, and that the decree of the Special Court of Appeals, January 27, 1873, having been rendered when the appellant appeared, and was fully heard without plea or objection to its jurisdiction, he was forever excluded from raising it afterwards. Indeed, the appellant, after the decree was rendered, prayed a rehearing in the Special Court of Appeals, without a suggestion of any defect in its jurisdiction or of the invalidity of the appeal.

Upon principles of practice not peculiar to Virginia, but universal in this country, that decree was final, and the Court of Appeals having so held in its decree of March 25, 1875, *non obstante*, the objection on the ground of Judge Willoughby's defective title to the judicial office presents no ground for the appellate intervention of this court to save the constitutional rights of the appellant, which he clearly waived, even had they ever existed.

If this be so, the appellant must appeal from the decree of the Special Court of Appeals of January 27, 1873. This he has not done, and could not now do, for he is barred by the act of Congress limiting appeals to two years.

The appellant is in this dilemma: He is barred of appeal from the decree of the Special Court of Appeals, and the appeal from the decree of the Court of Appeals cannot raise the question of the defect in the decree of the Special Court of Appeals, because that inquiry was excluded by the finality of that decree under State law, general and statutory, conformable in its character to the general practice of the country.

With these preliminary views, and insisting that the exhibits filed with the petition for appeal, dated February 21, 1874, (Rec., 25–29,) are not properly parts of the decree, I propose to discuss the question whether the defect of power in Judge Willoughby existed, and how far it can be inquired into.

1st. Could his title as judge, under which he allowed

the appeal, be inquired into by the court under the decree appealed from now? And is there any proof in the record of his lack of title? Or can this court take judicial cognizance of the facts on which his title rests? But supposing these questions answered against me, then—

2d. Was not the docketing of the case in the District Court, and afterwards in the Supreme Court of Appeals, equivalent to an allowance of appeal by that court, which cured the alleged defect, if it be a defect?

3d. Or if, when the Special Court of Appeals had decided the case without dismissal *ex mero motu*, or without motion to dismiss by appellee, is not that decision now conclusive and unavoidable? The term had long passed; the court had general jurisdiction to decide the cause; its decree is not void. Was it voidable by the Court of Appeals upon the last appeal?

4th. But, waiving all these points, I maintain that Willoughby had the right to grant, and did allow, a valid appeal May 17, 1869.

I may concede, for argument's sake, that the reconstruction laws were unconstitutional; that the military government thereby constituted in Virginia was an usurpation, and that Willoughby, Burnham, and Dorman were its appointees, who took the ermine which had been *de jure* worn by Moncure, Joynes, and Rives, JJ.

But I maintain the former were *de facto* judges of the Court of Appeals, and their judicial acts were, as to the private parties affected thereby, valid, or at most not void, but only voidable; that their acts were validated by the law of March 5, 1870, and that the decision by the Special Court of Appeals (which was *de jure*, as appellant concedes,) having been made without objection or proceeding by appellee to *avoid* the order allowing appeal, the appellee is concluded by that decision, however the appeal had been granted, and on this ground the opinion of the Court of Appeals places it in the decree now complained of.—(Rec., 266.)

Of all problems in political science the most insoluble is this: What constitutes a *de jure* government? No publicist has furnished a rule on this question which, by general acceptance, can claim the dignity of a canon of public law.

Must it rest on popular assent? If this be affirmed, then what is *popular* assent? Must both sexes, and all ages, and all colors assent? Will *vox majoritatis* be *vox populi?* Is there *jus divinum regum?* or is *vox populi vox Dei?*

Bolling rests on the original decree of Judge Thomas, September 13, 1867. Who made him a judge over us? The Peirpoint government. Was it *de jure?* Who made Moncure, Joynes, and Rives judges of the Court of Appeals, in place of the old court? Were they *de jure*, and the old court only *de facto*, judges? Who made the present judges? The new Constitution! Is it *de jure?* How adopted? Under whose orders? If Gen'l Canby could, under the Reconstruction Acts, exercise the instrumental power of the Legislature of Virginia in calling or organizing a constitutional convention, under whose Constitution the present court is *de jure* the Court of Appeals, could he not, under the same acts of Congress, oust the former court of the Peirpoint government and substitute judges in their places? Does not the vice detected in the title of Willoughby by learned counsel inhere, though indirectly, in that of the present court?—for both hold under the act of Congress, which the appellant must maintain to be unconstitutional.

The philosophic solution of these problems is that which common sense suggests and judicial decisions sanction.

Society, as a school for man, as the preserver of the race, and as his "state of nature," is ordained of God. Government, to preserve society from anarchy, and thus to preserve man for the purposes of his creation, is ordained of God. Without government society would be

disintegrated; without society man would perish. Bad as despotism is, it is preferable to anarchy; because, the preservation of the race is preferable to its liberty.

It follows, that though there be a contest between claimants of the right of government, a usurper is preferable to anarchy, and his acts for the preservation of society, in regulating the intricate relations of men and in deciding on their rights and wrongs, must be taken to be valid; because the alternative is anarchy, and man abhors that as nature is said to abhor a vacuum.

In that interim of military rule were all civil relations —all contracts of parties—all punishments of crime—all decisions of rights—invalid, because the agencies through which society was governed were appointed by the military government? Were marriages void, and the registry of deeds invalid, and convicts free, and criminals exempt from penalty?

On no questions of law are decisions more uniform and more in accord with sound political philosophy. Political science is a *practical* science—of all sciences should be the most practical. When it becomes merely theoretical it is a destroyer of society, instead of being, as divinely ordained, its preserver.

From the case of United States vs. Rice, 4 Wheaton, —, to the latest decision of the Supreme Court, the decision has been, that the usurper, though as against the *de jure* government he has no title, will, as to the body politic, and as to persons and their rights, be held to exercise validly the governing power. See Texas vs. White, 7 Wall., 732–3; Thorington vs. Smith, 8 Id., 1; Huntington vs. Texas, 16 Id., 402, 17 Id., 580.

In truth, the common law declared in the act, 11 Hen. VII., was according to this principle. Treason against usurpation would be punished by the king *de jure*. Why? Because the usurper, in preserving the kingdom from anarchy, which belonged *de jure* to the royal exile, should be obeyed, or else the kingdom would be destroyed.

See Hallam Const. Hist., p. 17, citing the diverse views of Hawkins vs. Blackstone, and maintaining, with the former, that under the ancient statute just cited a British subject is *bound*, and not merely permitted, to *aid* the *usurper* against *his rightful king*.

This statute was invoked by Vane for his protection, but failed upon a technicality, which modern jurists condemn.—(Lord Campbell in his Lives of Chief Justices, and Chase, C. J., in 8 Wall., 1.)

And the acts passed in the first years of the restoration of Charles II. gave validity to all acts of courts, &c., under usurpation of Parliament and the Protectorate.

Any other principle would place the fate of a people, as to all relations and rights, upon the solution of the insoluble problem, What constitutes the legitimacy of government? In other words, it would doom man to destruction, because theoretical philosophers cannot decide to what form of government he should be subjected.

But in Virginia the decisions are conclusive on this point.

In Mayoralty case, 19 Gratt., 702, Moncure, P., (*pro curia*) held that the Reconstruction Acts placed the State under military power—not that those acts were constitutional, but that *de facto* the military government ruled the State.

In Griffin vs. Cunningham, 20 Gratt., 31, the question was as to the power of appellate judges to decide a case after the military government ceased—*i. e.*, whether the derivative power continued after the termination of the appointing power. A majority of judges held the affirmative, and that the Legislature could not empower *this court* to reverse the decision of the military court. The dissent by Moncure, P., and Anderson, J., was based on the fact that the military government had ended, and the authority of the judges fell with it, and that the Legislature could authorize a review of these decisions. Neither of them, however, held that a decision by the military

court, *made* during the military government, was void, or was not validated by the act of November 5, 1870. On the contrary, both admitted that. (See p. 68–9, 89.)

But in Quinn's case, 20 Gratt., 138, prisoner was convicted February 25, 1870 (after Virginia was admitted into the Union). He sued out *habeas corpus*. The court unanimously refused it. Moncure and Anderson, JJ., concurred, on the ground that the act of the military judge was confirmed by the law of March 5, 1870. If Bramhall could send a man to the penitentiary in February, 1870, *after* the military power ceased, could not Willoughby allow a civil appeal in May, 1869, while it continued?

And in Teel vs. Yancy, 23 Gratt., 695, the decree of the District Court at Winchester, in December, 1869, was held valid and was affirmed—the court saying Griffin vs. Cunningham was no longer open for discussion, p. 695–6. Moncure, P., concurred in this opinion. If the District Court of Winchester was legal, was not that of Fredericksburg; and if the courts are legal, were not the judges who composed them?

These cases are conclusive, and the opinion in the present case confirms them.

Mr. Robinson has in his elaborate note cited many authorities. Without criticizing them, I refer to the accepted definition of an officer *de facto* by Lord Ellenborough—(6 East, 356.) "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Does not this cover Willoughby's case?

I ask, whose place he took—President Moncure's? Had Willoughby no color of title? Why, then, did President Moncure give way? Because, by military power he was ousted, and by like power Willoughby was seated. He had color of right—appointed under a law of Congress never yet held void—and enforced by irresistible power.

I think most, if not all the cases cited, and which are critically discussed in State vs. Carroll, 38 Conn., 449, cited by Mr. Brooke, will be resolved by reference to what I have already said.

The question in them all was between *two or more claimants* of an office under *one* and *an undisputed appointing power*. Here it is a question of the validity of an act done by a judge under an alleged usurping government, whose right is *undisputed* by any one, who claims under the *same government;* but is disputed only by one who held the office under an *ousted* and *expelled government*. No case cited is at all like this; for all were contests between claimants of office under the *same government*. Bearing this distinction in mind, the decisions cited, and the language quoted by Mr. Robinson, will appear wholly inapplicable.

But even in these cases, while, as between the claimants, the question of *de jure* claim is raised, yet as to the public and private parties, a reputed holding of an office without rightful claim, will make the official acts valid. Thus in cases of *quo warranto* or *mandamus* a party must show rightful claim, but his acts done *colore officii* may be valid. And this distinction will explain the cases cited. See Margate Pier Co. vs. Harrison, 3 Barn. & Ald., 266, and opinion of Abbot, C. J.; and Levant vs. Scadder, 66 E. C. L. R., 692; 3 H. of L. Cas., 418; and see Code, ch. 12, § 7, as to acts done *colore officii*.

In this case, the effect of the construction of the other side would be, that during the military regime no appeal could be allowed, and under the two years limitation, no provision being made, decrees would become final and without the right of appeal.

But suppose all this contention be allowed full weight. The court had appellate jurisdiction. The case got on its docket. It decided it. Can any court now declare its decision void? Is it void or now voidable?

Again: Did time run during the judicial *interregnum*, conceding there was one? By deciding the case on its docket, without objection by appellee, did not this court allow the appeal, and is not its decision now unavoidable by appellee? *Consensus tollet errorem.* It was an error, of which appellee was fully apprised. He made no objection. Is he not now concluded?

I therefore maintain that the appeal allowed by Willoughby was valid originally; but that it was validated by act of March, 1870, even had it been voidable.

But it is insisted that the validating act was unconstitutional, as it conflicts with the Constitution of the United States, art. 4, § 4, and 5th and 14th art. of amendments thereto.

As to art. 4, § 4, it clearly cannot apply here. There is nothing unrepublican in the form of a government, which, by legislation, validates a *judicial* act of *an officer de facto.*

The fifth amendment has no application to State action.—(Barron vs. City of Balt., 7 Peters.)

The fourteenth amendment does apply to States, but does it apply to this case?

It cannot, if I am right in saying that the appeal allowed by Willoughby was valid, and unless it was absolutely void. If merely voidable it was valid until avoided by State authority or by act of party. The State did not avoid, but validated it; the appellee has never sought to avoid it.

There are a large number of cases, some of which Mr. Robinson cites, where it is held a legislature cannot revive a right of appeal once lost, because violative of vested rights. Webster vs. Cooper, 18 How., is a case of it. See late case Byrne vs. Edmunds, 22 Gratt. But remark that this case is one in which an appeal was taken within the time allowed. If it was irregular for lack of official power, it is competent for legislature to validate it.—(2 Pet., 380.)

But these were cases where the functions of government have been undisturbed. The courts have decided again and again, without any statutory act, the operation of the act of limitations is suspended during war. Is it not when the courts are closed? Is it violative of the right of appellee to give appellant more than two years' time to bring an appeal, when appellee insists the appellant had no one to apply to within the time limited? See Sedgwick on Const. and Stat. Construction, p. 170, *et seq.*, for cases of retroactive laws held valid notwithstanding they seemed to disturb vested rights. See Cooley on Const. Limitations, p. 369, *et seq.*, ch. 11.

But even if a party has a right to the shield of the Constitution, he must assert it in due time or it will not avail him; and hence I maintain that even though the limitation barred appellant, yet when the decree of reversal is entered without raising the objection, the right will be waived, and cannot now be asserted by appellee.

But one other view need be mentioned. The rights of Bolling were not disturbed by the grant of appeal, but by the decree of the Special Court of Appeals. Even if the original grant was invalid, the after-hearing and decree by a *de jure* court is binding.

I will not enlarge upon the views presented by Mr. Brooke, showing that if the Court of Appeals of Virginia sustained the validity of the Reconstruction Acts of Congress, its action is not reviewable here under the plain terms of the Judiciary Act; and that the act of the State Legislature, confirming the authority exercised under these acts, even though it furnished the basis of the court's action, could not invalidate it, being in harmony with those acts. Each position seems clearly sustainable.

This court has so emphatically and recently settled that it will not review a decision of the highest State Court, unless it clearly and necessarily violates some right subject to Federal jurisdiction, that I need not cite the cases.

This decision now under appeal depends for its va-

lidity on rules of practice universally recognized, and infringes on no right which the Federal Courts are required to protect.

The unanimous decision of the court pronounced by its distinguished President, will commend itself to the sanction of this court; and nothing appears in the decree to invoke its jurisdiction, and hence the motion to dismiss must prevail.

I refer to Mr. Brooke's brief and authorities.

J. R. TUCKER,
For Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1875.--No. 658.

ROBERT B. BOLLING,
Plaintiff in Error,

AGAINST

GUSTAVUS LERSNER,
Defendant in Error.

Writ of Error to Decree of Supreme Court of Appeals OF VIRGINIA.

On Motion of Defendant in Error to Dismiss.

As to the Judicial Power of the United States. Especially of the Supreme Court upon a Writ of Error to a final Decree of the highest Court of a State.

CONWAY ROBINSON,
Counsel for Plaintiff in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court, United States.

OCTOBER TERM, 1875.—No. 658.

ROBERT B. BOLLING, *plaintiff in error,*
AGAINST
GUSTAVUS LERSNER, *defendant in error.*

Writ of error to decree of Supreme Court of Appeals of Virginia.

On Motion of Defendant in Error to Dismiss.

Admitting that under the 25th section of the act of Congress of 1789, (1 Stat. 85) and under the second section of that of 1867, (14 Stat. 385; Rev. Stat. p. 132, § 709) there may, upon a writ of error, be a re-examination of a final decree in a suit in the highest court of a State, where is drawn in question the validity of a statute of the United States, and the decision is *against* its validity, Mr. *Brooke* argues—and Mr. *Tucker* adopts the argument—that there can be no such re-examination where the decision is *for* the validity of the statute; even though its validity was in question upon the ground of its being in violation of the Constitution of the United States.* Such an argument

*Speaking of the plaintiff in error, Mr. *Brooke*, at p. 11 says: "If, *upon his motion*, the State court had declared the reconstruction acts unconstitutional, he could not stand in this court, for the decision would have been *in his favour*. If, on the other hand, the court had sustained said acts as constitutional, he would have been equally remediless, for the decision would have been *for* and *not against* the constitutionality of the acts. In either case, therefore, his 'raising and presenting' this

is in disregard of article 3 of the Constitution of the United States, which provides that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this constitution;" and in disregard of the authoritative exposition, which was in 1816 made of that article and has been repeatedly acted on.

In 1816, this court said: that "the language of the article throughout is manifestly designed to be *mandatory* upon the legislature." (*Martin* v. *Hunter's lessee*, 1 Wheat., 328); that it is not to be supposed "that under the constitution," Congress might defeat the Constitution itself" (Id. 329); but that "it is a duty of Congress" "to vest the whole judicial power" of the United States (Id. 330). Coming to the question as to the cases to which the clause shall apply, the court said, "the answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases in any form in which judicial power may be exercised." (Id. 333.) Proceeding then to speak of cases arising in the State Courts and coming before the judges thereof, this court said: "They were not to decide merely according to the laws or Constitution of the State but according to the Constitution, laws and treaties of the United States—'the supreme law of the land.'" (Id. 340, 341.) "In the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance

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question could not procure him a '*locus standi*,' in this court." Again, pp. 13, 15, speaking of the reconstruction acts in connection with the act of assembly of Virginia, passed on the fifth of March, 1870, (Sess. acts, 1869—'70) Mr. *Brooke* says: "If the constitutionality of these acts was adjudicated, and if the decision was in favor of the coustitutionality of both, and if the decision in *Bolling* v. *Lersner*, had rested on the same grounds, would this give the plaintiff in error a footing here? Certainly the decision *in favor of the constitutionality of the reconstruction acts* would not: and this being true, the enabling statute merely affirming or confirming the authority exercited under those acts would furnish no better ground."

of cases arising under the Constitution, the laws and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend," (Id.) "The appellate power of the United States must, in such cases, extend to State tribunals," (Id.) "They are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other co-ordinate departments of State sovereignty," Id. 344. And then is mentioned a motive "perfectly compatible with the most sincere respect for State tribunals," "which might induce the grant of appellate power over their decisions" (Id. 347); and which emphatically applies to the present case.

"That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to controul these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States, might be different in different States, and might perhaps never have precisely the same construction, obligation or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. *What, indeed, might then have been only prophesy has now become fact; and the appellate jurisdiction must continue to be the only remedy for such evils.*" Id. pp. 347, 348.

"There is an additional consideration which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary surposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights or assert their privileges, before the same forum." Id. 345.

Since the act of 1867 (14 Stat., 385), similar views have been expressed by this court. In delivering its opinion at October Term, 1874, *Miller* J, said : " In a vast number of cases, the rights of the people of the Union, as they are administered in the courts of the States, must depend upon the construction which those courts give to the constitution, treaties and laws of the United States. The highest courts of the State were sufficiently numerous, even in 1789, to cause it to be feared that with the purest motives, this construction given in different courts, would be various and conflicting. It was desirable, however, that whatever conflict of opinion might exist in those courts on other subjects, the rights which depended on the Federal laws should be the same every where, and that their construction should be uniform. This could only be done by conferring upon the Supreme Court of the United States—the appellate tribunal established by the Constitution—the right to decide these questions finally, and in a manner which would be conclusive on all other courts, State or National." *Murdock* v. *City of Memphis*, 20 Wallace, 631, 632. At the same time, this court further said : " it was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal, if he desired it, where the decisions of the State courts were against him on that question; that rights of this character, guaranteed to him by the Constitution and laws of the Union should not be left to the exclusive and final control of the State courts." S. C. 632.

The act of 1789 making like provision " where is drawn in question the construction of any clause of the Constitution or of a treaty," the decision in 1816, as to the title set up with reference to the treaty, applies here

as to the title set up with reference to the Constitution. The court says, "the objection urged at the bar is that this court cannot enquire into the title, but simply into the construction put upon the treaty by the Court of Appeals; and that their judgment is not re-examinable here unless it appears on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and *non constat*, that they did not) independent of the treaty, there is an end of the appellate jurisdiction of this court." After thus stating the objection, the opinion of the court is pronounced in the following terms:

"If this be the true construction of the section, it will be wholly inadequate to the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title *set up by the party*. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide, whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary enquiry into the existence and structure of the title, before the Court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and therefore, not protected by the treaty, must not this court have a power to decide the title to be good and therefore protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party in reference to the treaty, equally ascertained and decided? Nor does the clause,* relied on in the objection, impugn this construction. It requires that the error upon which the Appellate

*The last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears *on the face* of the record and immediately respects the before mentioned questions of construction of the constitution, treaties, &c., in dispute.

Court is to decide, shall appear on the face of the record and *immediately respect* the questions before mentioned in the section. One of the questions is, as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the Court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the Court." *Martin* v. *Hunter's lessee*, 1 Wheat, 357, 358, 359.

"But the point has been already decided by this Court upon solemn argument. In *Smith* v. *the State of Maryland*, 6 Cranch, 286, precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the Court. That case was, in some respects, stronger than the present; for the Court below decided, expressly, that the party had no title, and, therefore, the treaty could not operate upon it. This Court entered into an examination of that question, and being of the same opinion affirmed the judgment. There cannot then be an authority which could more completely govern the present question." S. C., 1 Wheat, 259, 360.

According to these and other decisions, this Court has *jurisdiction* when the State court could not have made the decree which it has made without deciding against the validity of the right, title, privilege or exemption set up under the Constitution, treaty, &c. *Harris* v. *Dennie*, 3 Peters, 302. This principle is no wise impaired or affected by the cases which Mr. *Brooke* cites, pp. 4, 5; it is almost superfluous to remind the Court of recent instances of its application. *Buck* v. *Colbath*, 3 Wallace, 340, 7 Id., 345; *Green* v. *Van Buskirk*, 5 Id., 314; *Furman* v. *Nichol*, 8 Id., 56; *Aldrich* v. *Ætna Co.*, Id. 495; *Maguire* v. *Tyler*, 8 Id., 651; *Railroads* v. *Richmond*, 15 Id., 3; *Pennywit* v. *Eaton*, Id. 380; *Hall* v. *Jordan*, Id. 393; *Crapo* v. *Kelly*, 16 Id., 620.

Mr. *Brooke's* position, that a party who, against an act of Congress, sets up and claims in a State court a title, right, privilege, or exemption under the Constitution of the United States, is remediless when that court sustains the act as constitutional, finds in the numerous cases in

the Supreme Court, from the time of the adoption of the Constitution of the United States down to the present time, no support, except in one solitary instance, wherein this court "confined its attention to the first clause of the twenty-fifth section of the Judiciary act, and in its *decision* appears to have overlooked the third clause." *Roosevelt* v. *Meyer*, 1 Wallace, 512. This decision was soon overruled, (*Trebilcock* v. *Wilson*, 12 Id., 692); and therefore Mr. *Brooke* is not justified in confining his attention to the first clause of the act of 1867 and overlooking the third clause. This act makes no such change in the language of the act of 1789 as will affect the appellate jurisdiction of this court in this case. S. C., 694. When the decision of the highest court of the State is against a right, privilege or immunity claimed under the Constitution of the United States, it is considered that the jurisdiction of this court to review that decision is within the express words of the act of 1867 *Banks* v. *The Mayor*, 7 Wallace, 22. When any one of the questions specified in this act has been raised by the plaintiff in error, and decided against him by the highest court of the State, the jurisdiction of the Supreme Court of the United States has attached, and it must hear the case on its merits. *Murdock* v. *City of Memphis*, 20 Wallace, 628; *Railroad Co.* v. *Maryland*, Id. 645, 21 Id., 467; *Mathews* v. *McShea*, 20 Id., 646.

These rules are to be applied to the present case.

The decision below is equivalent to a perpetual stay of proceedings upon the decree made by the Circuit Court of Fauquier county, in Virginia, on the 13th day of September, 1867 (p. 264), and a perpetual denial of all the rights acquired under that decree; although it was by a judge appointed under "what was known as the Pier-

point government—an organization which was recognized by the President and by Congress as the State of Virginia," and afterwards recognized as such by this court. *Virginia* v. *West Virginia*, 11 Wallace, 56. As stated (pp. 105, 106), the State was in the possession of the power to maintain a judicial department; and it is not pretended that any grant of it to the general government is found in the Constitution of the United States. It is, therefore, as this court has said, "one of the sovereign powers vested in the States," and "in respect to which the State is as independent of the general government as that government is independent of the State." *Collector* v. *Day*, 11 Wallace, 126.

Although, under the Constitution of the United States, which provides in art. 4, § 4, that "the United States shall guarantee to every State in the Union a *republican* form of government," Congress had on the 2d of March, 1867, passed an act to constitute the State of Virginia the first *military* district, and make it subject to the *military* authority of the United States, (14 Stat., p. 428,) and although there was a supplementary act of the 23d of March, 1867, (15 Id., p. 2,) and another of the 19th of July, 1867, (Id., p. 14,) yet the duress created by these acts caused no immediate change in the judges of the Supreme Court of Appeals of Virginia, (20 Grat., 74); caused none until after January term, 1869, (19 Grat., p. 28 to p. 479). And to the decree of September 13, 1867, there was no supersedeas until the spring of 1869.

It is a fact forming part of the history of the country (p. 109) that now—in the spring of 1869—the three judges of the Supreme Court of Appeals of Virginia gave way to, and were substituted by, three persons who never had any valid commission or appointment as judges under the State government, but entered upon

the judicial office under colour of the said acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, commonly called the reconstruction acts, and of an appointment by the general exercising military authority under the second section of the said act of the 19th of July, 1867; and that the said three persons last named were *Horace B. Burnham*, *O. M. Dorman* and *W. Willoughby*. At page 543 of the 19th volume of reports by Mr. *Grattan*, the State reporter, are these words: "Judges of the *Military* Court of Appeals, *Horace B. Burnham*, President; *O. M. Dorman*, *W. Willoughby*." At page 125 of the record in this case is the order of the 17th of May, 1869, awarding an appeal from the decree of the 13th of September, 1867; and this order is signed "*W. Willoughby*, judge." Until he assumed the judicial office there had been acquiescence in that decree—neither party had applied for an appeal from it.

There was a material change* on the 26th of January, 1870. Then the military government terminated and *civil* government was restored. Soon afterwards, to wit: on the fifth of March, 1870, the General Assembly of Virginia enacted that officers "who are eligible to office

* In the Supreme Court of Appeals of Virginia, in 1870, *Anderson* J. said: "This was not simply a change of the organic law, or government of the body politic, in which the officers under the old, and the officers under the new, are the official agents or trustees of the same State or body politic. But it is the deliverance of the State from a government which was no part of the State or of the body politic: a government which was not Virginian but which was outside of Virginia, a government which had been put over us not by the body politic but forced upon us by bayonets, by an outside power, and which was withdrawn when our civil government—the government of the body politic—was restored." 20 Grat. 71. Speaking of Mr. *Burnham* and his two associates, of whom, as we have seen, *W. Willoughby* was one, *Anderson* J. says: "they were the agents or servants of the military power which appointed them to office and amenable only to it; a power which was independent of us and had no sympathy with us, and which, in its constitution and nature, was adverse to *civil* government." 20 Grat. 71, 72. See also as to *Burnham*, *Dorman*, and *Willoughby*, pp. 83, 84.

under the existing Constitution and laws of Virginia, and who qualified on or before the 26th of January, 1870, and none others," be "recognized as legal officers." (Sess. acts, 1869–'70, p. 16, ch. 18, § 1); and official acts done by such officers and otherwise lawful are "declared as legal and binding as if they had been done by officers duly elected and qualified under the Constitution of this State;" subject however to a certain proviso. Id. p. 17, § 2.

A question as to the constitutionality of that proviso came under the consideration of the Supreme Court of Appeals in 1870, in *Griffin's exor.* v. *Cunningham*, 20 Grat. In the opinion of the majority who held that proviso unconstitutional, there is, at pages 52 and 53, a recognition by *Christian* J. of principles and authorities relied on in the present case, p. 110 to 112, or pp. 117, 118. It is admitted by *Staples* J. p. 81, 85, 86, that the legislature "cannot by retrospective laws make valid proceedings had in court which were originally void for want of jurisdiction," and it is considered by *Joynes* J. p. 107, that the legislature cannot supply "a total want of authority or color of authority in those who pretended to act as judges." He asks "if the legislature could confirm the void act of these pretended judges as they are called, why may it not confirm the void act of any other person who undertakes to hold a court and decide a case? Why might not a legislature, if one could be found corrupt enough or lawless enough, confirm the act of a mob which resolved itself into a court with a grand jury and petit jury and convicted a man of murder." Authorities are referred to by him and *Staples* J. as well as by *Christian* J.

On the 28th of February, 1872, there was passed "an act to provide a special Court of Appeals." (Sess. acts, pp. 98 and 99.)

Although, just before the passage of this act, there had been raised and presented to the Supreme Court of Appeals in *Myers's exor.* v. *Zetelle*, (mentioned on p. 112 in note 3) a question as to the validity of a judicial act of military appointees, and a decision of that question was rendered unnecessary by a reversal of that judicial act upon its merits—yet the present case, wherein the order of *W. Willoughby* allowing the appeal presented a like question, was by an order of the Supreme Court of Appeals, made the 19th of April, 1872, (p. 27 to 29) without the knowledge of, or notice to, the now plaintiff in error, or his counsel, certified with forty-nine others to the special Court of Appeals to be tried or disposed of." This case was so certified, although the Supreme Court of Appeals in its recent opinion, recognizes (p. 268) that "it was not contemplated nor intended that cases involving a question of *constitutionality* of a law should be referred for decision to a special Court of Appeals." (p. 268.)

The term of the Supreme Court of Appeals ending immediately after the order of the 19th of April, 1872, and there being no opportunity of making during the term objections to the transfer to the special Court of Appeals, such objections were communicated* to the judges of the Supreme Court of Appeals in vacation (p. 85 *et seq.*) "in order that they" might "have an opportunity of conferring upon and considering the subject before they" should "meet at Richmond; and, in the meantime, of giving such instructions to the clerk there and having such communications made to adverse counsel as they"

*In examining the transcript from Fauquier and preparing the petition to the Supreme Court of Appeals, it was observed that, in copying these communications, matter which in the original was at the bottom of a page and in the form of a note was by the clerk of Fauquier introduced in the body of a document and formed part of a long and awkward sentence. As to this matter there is a letter of explanation, (pp. 99, 100.)

might "deem proper." (p. 87.) Among the observations there made are the following, (p. 91:)

"Regard should be had to the fundamental principle that a party to a cause is not to be affected by judicial action therein without an opportunity of being heard. (6 Rob. Pract., tit. 5, pp. 625, 626.) Action to remove a cause from the supreme judicial tribunal of the State, composed of *five* judges, to an inferior tribunal, composed of *three* circuit judges, may materially affect a party to that cause, and should not be had without hearing what he has to object against it. Such action without such hearing* may be treated like any other step in a cause improvidently taken; like any other order improvidently made. Proceedings had pursuant to an order certifying to a special court a cause which ought not to be certified thereto may be regarded as of no more moment than proceedings had pursuant to an order directing an issue which ought not to be directed. The proceedings had pursuant to the order improvidently made in the one case are as immaterial as those had pursuant to the order improvidently made in the other case. (*Wise* v. *Lamb*, 9 Grat., 308.) Notwithstanding such proceedings in the case of *Lersner* v. *Bolling*, the Supreme Court may set aside the order certifying this case, and further order, if it see occasion therefor, that the special court from all further proceedings in the cause do altogether surcease. (*Wynn* v. *Wyatt's Adm'x*, 11 Leigh., 587.) Such should now be the course in *Lersner* v. *Bolling*, not only because a party to the cause objects to its being tried by the special court, but also because the character of the cause makes it proper that it should be heard by the Supreme Court of Appeals, even if it could be certified to the special court consistently with the Constitution. In such a cause it is no sufficient answer to say (even if the fact were so) that the special court might be able to decide it somewhat sooner than the Supreme Court. It is enough, in a case of such a character, that it may be decided by the Supreme Court without unreasonable delay. But the objection that the cause could not be certified to the special court consistently with the Constitution, furnishes a further and decisive reason for such action as the Supreme Court is now asked to take; for this objection cannot be determined by an inferior court, and unless obviated by an amendment of the act of February 28, 1872, must be determined sooner or later by a tribunal higher than the special court."

*The communication of September 9, 1872, has here (p. 91) the following note: "If there had been notice that on a certain day the first fifty cases would be called, and the counsel for a party to a cause might, on its being so called, state his objections to its being certified, then there might and would have been in *Lersner* v. *Bolling* a statement of such objections as might and probably would have been deemed by the court sufficient to prevent its being certified; but there was no opportunity of making such statement before the court's adjournment in April."

On the 17th of January, 1873, there was passed the subjoined act.*

The Special Court of Appeals did not deem it proper to transfer this cause to the Supreme Court of Appeals; and there was a remarkable conclusion. The party moving to obtain a decree had been plaintiff in equity; his cause was heard in the court below by one *circuit* judge, and in the Special Court of Appeals by three other *circuit* judges; his decree of Jan. 27, 1873 (pp. 29, 30) for specific execution is obtained by the opinion of two circuit judges (*Wingfield* and *McLaughlin*) against the opinion of two other circuit judges (*Thomas* in the court below and *Barton* in the special court); and there has been no further consideration by any judge of any tribunal as to the propriety of such specific execution. The special court was asked (p. 94) to set aside its decree, and afterwards, under the act of Jan. 29, 1873, transfer the cause to the Supreme Court of Appeals; but it refused so to do.

A copy of the decision of the special court being transmitted to the clerk of the Circuit Court of Fauquier county (pp. 29, 30) a question arose under *French* v. *Noel*, 22 Grat., 454, and other cases cited in 7 Rob. Pract. Ch. 1, § 17, p. 124, *et seq.*, as to the effect of that decision. In the Circuit Court, on the 17th of April, 1873, the now plaintiff in error appeared and resisted the entry of that decision, as the decree of the Circuit Court, insisting that the said decision "is null and void for the

* "That hereafter, when any cause which has been certified to the Special Court of Appeals for trial *shall be called for trial* in said court, and it shall appear that one of the judges of said Special Court of Appeals has tried said cause as a circuit judge, or it be deemed proper by the court for any other good cause, it shall be the duty of said Special Court of Appeals to transfer said cause to the Supreme Court of Appeals, with a certificate of such fact, and to proceed no further therein; and thereupon said cause shall be redocketed in the Supreme Court of Appeals." Sess. acts 1872–'3, p. 26, ch. 39.

reasons and upon the grounds stated and set forth in his "*written objections filed and ordered to be made a part of the record in this cause.*" They are pp. 31, 32 and p. 100 *et seq.*

For a re-hearing of the decree, entered on the 17th of April, 1873, there was presented on the 17th of December, 1873, a petition with exhibits; and the court (p. 83) allowed said petition and exhibits to be filed. They are p. 83 to p. 95. Under a decree of Dec. 20, 1873 (p. 95) a report was filed; and on the 23d of that month the circuit court made its final decree p. 99.

Whereupon there was presented to the highest court of the State, a petition (p. 1 et seq.) for an appeal, which was allowed. This petition shows what title, right, privilege, or immunity is claimed under the Constitution of the United States. The fact of the decision being against the title, right, privilege and immunity, specially set up and claimed by the now plaintiff in error, under the Constitution, appears by the final decree of the 28th of March, 1875 (p. 265) made (as appears on the face of the decree) "for reasons stated in writing and filed with the record;" which reasons are p. 265 to 277.

This petition, before the highest court of the State, insists on the objections made before the Circuit Court (pp. 31, 32), and on the grounds taken before that court in the argument, p. 102 to 119, and in the petition for rehearing. p. 83. The objections so made before the Circuit Court, embrace a position* which is founded on the 4th section,

* After mentioning the acts of Congress of the 2d of March, 1867, 23d of March, 1867, and 19th of July, 1867, commonly called the reconstruction acts, the now plaintiff in error there (p. 31) insists "that the said acts were each and all of them passed, not according to the first section of the first article of the Constitution of the United States in the exercise of powers therein granted, and were not necessary or proper for

of the fourth article of the Constitution of the United States, and on the tenth article of the amendments to said Constitution, and which is in accordance with the opinion of this court in 1816, that "the government" "of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter's lessee*, 1 Wheat., 326. The now plaintiff in error then insisted that according to the true construction of the clauses of the Constitution just mentioned, "the said acts of Congress are not, any of them, laws made in pursuance of said Constitution, but that each of them is invalid, and that the authority exercised under the United States, by force of said acts is also invalid. And insisting on the title, right and privilege conferred or recognized by these clauses, of the Constitution," he "claims exemption under said clauses, from the order of said *W. Willoughby* allowing the appeal." This claim is enforced in the argument, p. 102 to 110.

But the petition to the highest court of the State does not stop with referring to, and insisting upon, the objections that were before the Circuit Court. It specially claims, p. 2, that the decree of the 13th of September, 1867, "was by a court of competent jurisdiction, and is valid until it shall have been lawfully reversed;" and claims that it "has never been reversed by 'due process of law.'" It claims (p. 2), that when under colour of

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carrying into execution those powers or any powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, but are plainly repugnant to the fourth section of the fourth article of said Constitution, which requires that 'the United States shall guarantee to every State in the Union a *republican* form of government;' and to the 10th article of the amendments to said Constitution, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

said acts of Congress, "and of an appointment by the general exercising military authority, under the second section of the said act of the 19th of July, 1867, *W. Willoughby* took upon himself to act as judge in Virginia, such action was in violation of the Constitution of the United States (which every judicial officer is bound by oath to support), and has no more legal validity because of those acts of Congress, or the action thereunder by the President of the United States, or by the genera exercising military authority, than it would have had if there had never been such acts of Congress, or such action by the President or the General."

After which is this position: (p. 2)

Hence, the words 'appeal awarded,' with the name of *W. Willoughby* as the signature, were entitled, in law, to no more effect than if they had been written by one of the counsel in the cause, or by any body else. The allowance of the appeal was null and void. It was not by 'due process of law,' but by undue process, and in violation not only of the Constitution of the State but of the first section of the first article of the Constitution of the United States, and of the fourth section of the fourth article of said Constitution, and of the fifth and tenth articles of the amendments to said Coustitution, and also of the fourteenth amendment thereto.

To the writ of error it is in vain objected by Mr. *Tucker* (p. 3), that it is not to the *interlocutory* decree made by the special court on the 27th of January, 1873, but is, to a *final* decree, made by the highest court of the State on the 25th of March, 1875. For according to repeated decisions of this Court, the case could not have been brought before this Court in any earlier stage. *Brown* v. *Union Bank of Florida*, 4 How., 465; *Pepper, &c.*, v. *Dunlap*, 5 Id., 51; *Tracy* v. *Holcombe*, 24 Id., 426; *Moore* v. *Robbins*, 18 Wallace, 588; *St. Clair Co.* v. *Lovingston*, Id. 628. As this Court said in a recent case, it is only the last decree which the State Courts can give in a suit, that can be brought here for re-examination; it is only

after the power of the State Courts is exhausted that the power of this Court can be called in action. "This Court must be the last resort of litigation in State Courts." *Purcels* v. *Johnson*, 20 Id., 654.

Nor can it avail to suggest, as Mr. *Tucker* has done, p. 4, that the docketing of the case in the Appellate Court was equivalent to an allowance of appeal by that Court. No such clerical act can prevent an objection to the *jurisdiction* of an Appellate Court; but objection to its jurisdiction may be made at any time before its *final* decree in the cause. Though a cause should be on the docket of this Court one year, two years, or three years without any objection being made to its jurisdiction, that will not prevent the objection being taken at the final hearing. Even though a motion to dismiss for want of jurisdiction shall have been made and overruled, that will not prevent this Court, when, at a later stage, the cause is heard upon its merits, from then dismissing it for want of jurisdiction, if, then, it shall be of opinion that the objection to the jurisdiction is well founded. Such is the familiar practice of this Court. There have been several instances in which this Court, at the time of a motion to dismiss for want of jurisdiction, was not sufficiently satisfied of the want of jurisdiction to dismiss the cause on such motion, but in which, at the final hearing, it has, upon further argument and more mature consideration, decreed the dismission.

In the present case there is another reason quite sufficient to prevent this court from going into any question growing out of the stage of the cause at which the objection to the *jurisdiction* was presented to the court below. Mr. *Tucker* is mistaken in his statement, pp. 2, 3, 4, as to what the highest court of the State *decided*. Although, according to the passage quoted by Mr. *Brooke*, pp. 14, 15, it was

argued before that court that the objection came too late, yet that court has said, in so many words, (p. 267), that its decree is made "*without deciding that question.*" This court after it had, in 1813, exercised jurisdiction and pronounced judgment in *Fairfax's devisee* v. *Hunter's lessee*, 7 Cranch, 603, did in 1816, re-examine the question of its jurisdiction as it stood upon the record before in judgment. *Martin* v. *Hunter's lessee*, 1 Wheat., 355. In the present case, notwithstanding what had been done by the Special Court of Appeals, and notwithstanding the argument that the objection to the validity of the appeal allowed by W. Willoughby came too late, the highest court of the State has, *without deciding that question*, pronounced its opinion "*that the said appeal was a valid appeal,*" (p. 266.) By thus holding the appeal valid from and after the 17th of May, 1869, when *W. Willoughby* awarded it, the highest court of the State has decided against the title, right, privilege and immunity specially set up and claimed under the Constitution of the United States.

On the present motion there is no occasion to consider the reasons or grounds of this decision. Consequently it is not material to consider those urged in support thereof by Mr. *Brooke*, p. 13, and by Mr. *Tucker*, p. 4 *et seq.* No matter what may have been the reasons or grounds of the decision, it is none the less a decision against the title, right, privilege, and immunity so specially set up and claimed under the Constitution.

The jurisdiction of this court is none the less,—on the contrary it is still more plain,—when it appears that there was drawn in question, the validity of a statute of, or an authority exercised under a State on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity.

That it is the province of the courts of a State to construe its constitution and statutes is no doubt true as a general rule. But, as this court has often said, that will not prevent this court from exercising jurisdiction upon a writ of error to the highest court of a State when it is manifest that the repugnancy of a statute to the Constitution of the United States was in question. *Satterlee* v. *Matthewson*, 2 Peters 410; *Craig, &c.*, v. *State of Missouri*, 4 Id. 410; *Planter's Bank* v. *Sharp, &c.*, 6 How. 301; *R. F. & P. Railroad Co.* v. *Louisa Railroad Co.*, 13 Id. 71; *Curran* v. *State of Arkansas, &c.*, 15 Id. 304; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace, 116. *Swayne* J. in delivering the opinion of the court at December T., 1869, said: "In all the cases brought here under the 25th section of the Judiciary Act, this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of the *Jefferson Branch of the State Bank of Ohio* v. *Skelley*, it was well asked of what value would the appellate power of this court be to the party aggrieved, if such were not the rule." *Butz* v. *City of Muscatine*, 8 Wallace, 582; *Township of Pine Grove* v. *Talcott*, 19 Id. 678.

Although the highest court of the State was (p. 266) "of opinion that the said appeal was a valid appeal according to the law of this State, as it has been settled by this court in the cases of *Griffin's exor.* v. *Cunningham*, 20 Grat. 31, and *Quinn, &c.*, v. *The Commonwealth*, Id. 138,"—although it may have considered that the General Assembly could by the act of the fifth of March, 1870, ch. 18, § 2, p. 2, recognize *W. Willoughby* as a *judicial* officer of this commonwealth, and make acts thereto-

fore done by him as legal and binding as if they had been done by a *judicial* officer duly elected and qualified under the Constitution of this State; yet this court has plain jurisdiction; there having been drawn in question the validity of that act of the fifth of March, 1870, and the authority exercised under it on the ground of their being repugnant to the Constitution of the United States and the decision being in favor of the validity.

The jurisdiction of this court is still more plain when it is seen that it was specially set up and claimed that by and through the act of the 5th of March, 1870, and the authority exercised under it, the plaintiff in error was without due process of law, and in violation of the fourteenth amendment to the Constitution of the United States, deprived of property, wherein by the decree of the 13th of September, 1867, a right was vested in him.

Whatever might have been the power of the legislature as to officers merely *ministerial*, and as to acts theretofore done by such *ministerial* officers, the now plaintiff in error has insisted before the Circuit Court (pp. 110 to 112, and pp. 117, 118) and before the highest court of the State (p. 3) that the General Assembly could not, consistently with the fourth section of the fourth article of the Constitution of the United States, or the fourteenth amendment thereto, recognize *W. Willoughby* as a *judicial* officer of the Commonwealth, nor make acts theretofore done by him as legal and binding as if they had been done by a judicial officer duly elected and qualified under the constitution of the State. He has before the highest court of the State insisted (p. 3) that the order of the 17th of May, 1869, (allowing the appeal), was before and until the act of the 5th of March, 1870, null and void; that the same, notwithstanding that act, continued

to be null and void; and that the decree of the 13th of September, 1867, remains binding, notwithstanding any subsequent act of the legislature. The decision of the highest court of the State is against what was so specially set up and claimed; though this claim is founded upon authorities cited, (pp. 110, 111, 117,) among which are the decision of this court in 1852 in *Webster* v. *Cooper*, 14 How., pp. 502, 503, and cases in Maine there approved—cases which hold that "a judgment or decree is valid notwithstanding an act of the legislature passed to deprive a party thereof," and which are supported by others cited in 7 Rob. Pract., tit. 1, § 8, p. 26.

Adjudications of State courts upon Magna Charta or upon the fifth amendment to the Constitution of the United States will no doubt be weighed and considered by this court when the time shall come for it to make such an exposition of the fourteenth amendment as shall be proper, and uniform through the United States. On the present motion it is enough to know that by reason of this amendment* there is jurisdiction in this court in this suit, wherein a party sets up and claims a title, right, privilege and immunity against deprivation by a State of property without due process of law; and the jurisdiction is none the less because of the particular department of the State government which may have caused or been instrumental in such deprivation.

Hence there is jurisdiction in this court of what is set up and claimed under the same amendment before the Circuit Court (p. 32, p. 116 to 118, and p. 84) and before the highest court of the State (p. 4 to 6 and pp. 9, 10)

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* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, *nor shall any State deprive any person of life, liberty, or property without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws."

against the order of the 19th of April, 1872, (pp. 27, 28), made without the knowledge of or notice to the plaintiff in error or his counsel, whereby the Supreme Court of Appeals transferred this case, over which it had full and complete constitutional jurisdiction, to a court which could not exercise jurisdiction in respect to some, at least, of the questions arising therein.

The disposition of cases with convenient dispatch is desirable and laudable when, and only when, justice is administered according to the Constitution—with due regard to fundamental principles.

This court has said: "It is a rule old as the law that no man can be condemned in his rights of property, as well as in his rights of person, without his day in court—that is, without being duly cited to answer respecting them, and being heard or *having opportunity of being heard* therein." *Terrell* v. *Allison*, 21 Wallace, 292. This "rule, old as the law," has been disregarded in the present case.

The Supreme Court of Appeals now recognizes (p. 268) that "it was not contemplated nor intended that cases involving a question of constitutionality of a law, should be referred for decision to a Special Court of Appeals, which must consist, in part at least, and may consist entirely, as in the instance of the special court in question, of circuit court judges;" and states (also p. 268) that "in certifying cases to the special court for decision, of course the Supreme Court would certify none which was known to involve a constitutional question." Yet this case, which did involve a constitutional question, was certified to the special court; and the mistake which the Supreme Court made, in this respect, was never corrected, although counsel for the now plaintiff in error did, in a written communication to the President of that

court, mention that mistake and endeavor to get it corrected (pp. 90, 91, 92); and did this *more than four months before* the decision of the special court (pp. 29, 30). The Supreme Court of Appeals recognizes (p. 271) that there might be peculiar reasons for not certifying a particular case to the special court, such as the fact that a constitutional question existed," &c.; it observes that "such facts which would be cases of rare exception, might be brought to the notice of either court at any time; and the case, whenever proper, would be restored to the docket of this court." Yet this cause, although the fact that a constitutional question existed, was, as appears p. 92, brought to the notice of the judges of the Supreme Court, was, nevertheless, not restored to the docket of that court.

Before the Circuit Court of Fauquier, the objection taken, p. 32, is enforced in the following terms:

"The character of the cause would have been made known— the objections to a transfer of it from the Supreme Court would have been stated— if there had been an opportunity of doing so, as the manner was under the acts of 1848 and 1854, or in any other manner. But there was no such opportunity. To transfer this important cause from the supreme judicial tribunal of the State, composed of five judges, to an inferior tribunal consisting of only three circuit judges, was a step in the cause which might cause a party to be deprived of his freehold, and therefore a step which, according to the law of the land— the great principle of Magna Charta— should not have been taken, without giving to such party or his counsel an opportunity of being heard in regard to it."

It is specially set up and claimed (p. 118) that by the proceedings under color of the act of February 28, 1872, "there has been a decree which, in violation of said fourteenth amendment, will deprive the defendant of 'property without due process of law' if such decree be allowed to operate." And the same is again set up and claimed before the highest court of the State, (pp. 9, 10.)

That court admitting (p. 270) "that no opportunit was afforded the appellant to object to such transfer c show cause against it" rests its decision on the groun that "the act of Assembly made no provision for afford ing such opportunity." This is a decision against th title, right, privilege and immunity, specially set up an claimed under the fourteenth amendment; which ap plies to an act of the State through any department c its government.

The principles of Magna Charta and the fourteenth amendment forbid that a legislature should confer on court such power as the Supreme Court of Appeals con siders was conferred on it by the act of April, 1872; and even if the power was conferred, forbid that it shoul have been exercised as it was exercised by the order p. 27 to 31. It could not (consistently with those princi ples), be justified even if it had caused a final termination of this case with dispatch, but instead of that, it has caused protracted litigation; this case if it had not been em braced in that order would probably have been heard before, and *finally* determined by, the Supreme Court o Appeals, *upon its merits*, in the latter part of 1872 o early in 1873; in such event this court would probably not have been troubled with it, any more than it wa with *Myers's exor.* v. *Zetelle*, (mentioned on p. 112 in note 3.)

As it is, the jurisdiction of this court has attached and according to its constant course of decision, the motion to dismiss should be overruled and the case heard, in due time, upon its merits.

CONWAY ROBINSON,
Counsel for plaintiff in error.

JANUARY 1, 1876.